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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

EDWARD LaMON AND LORRAINE LaMON,

Petitioners,

v.

BETTY BUTLER and THE DAILY WORLD, a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN R. QUINLAN*
MILTON G. ROWLAND

Of –
PAINE, HAMBLEN, COFFIN,
BROOKE & MILLER
1200 Washington Trust
Financial Ctr.
Spokane, Washington 99204
(509) 455-6000

**Counsel of Record for Petitioners*

May 26, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does the First Amendment to the federal Constitution (1) require a private figure plaintiff in a defamation action involving a media defendant to establish fault by a heightened standard of proof in response to a motion for summary judgment, or (2) permit distinctions based on the status of the defendant in defamation cases involving private figure plaintiffs?

II. Do the Seventh and Fourteenth Amendments to the federal Constitution limit a trial court's power to award summary judgment in a civil action, and an appellate court's power to sustain such award on grounds which were not presented to the trial court and which the trial court did not consider?

PARTIES

The parties to this case, as defined by Rule 19.6, are the petitioners Edward LaMon and Lorraine LaMon.

The respondents are Betty Butler and The Daily World, a corporation.

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No. _____

In The

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October Term, 1988

EDWARD LaMON AND LORRAINE LaMON,

Petitioners,

v.

BETTY BUTLER and THE DAILY WORLD, a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Petitioners Edward and Lorraine LaMon respectfully petition the Court for a Writ of Certiorari to review the Washington Supreme Court's decision in this proceeding.

OPINIONS BELOW

The Opinion of the Washington Supreme Court of March 10, 1988, is reproduced in Appendix A, App. 1, *infra*. The Opinion of the Washington Supreme Court on Petition for Rehearing, dated March 30, 1989, is reproduced in Appendix B, App. 29, *infra*. These opinions are reported at 110 Wn.2d 216, 751 P.2d 842 (1988), and 112

Wn.2d 193, 770 P.2d 1027 (1989), respectively. The opinion of the Washington Court of Appeals, 44 Wn.App. 654, 722 P.2d 1373 (1986), is reproduced in Appendix C, App. 57, *infra*.

The decision of the trial court, granting the Defendants' motion for summary judgment, is reproduced in Appendix D, App. 68, *infra*.

JURISDICTION

Edward LaMon and Lorraine LaMon, Petitioners, seek a Writ of Certiorari to the Supreme Court of the State of Washington for review of the opinion filed therein on March 30, 1989, which affirms the earlier opinion of that Court, and the opinions of the intermediate appellate court and the trial court, dismissing Petitioners' complaint for damages, which alleged, *inter alia*, that Respondents' publications defamed them. The Court's jurisdiction to review the opinions of the Washington Supreme Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case arises under the First Amendment, the Seventh Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution.

The First Amendment provides the following, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press . . .

The Seventh Amendment provides in pertinent part:

In Suits at Common Law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no facts tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment due process clause provides in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

RULE 21.1(h) STATEMENT

The First Amendment issues raised by this Petition have been presented to every court, by both parties. *See* opinion of the Washington Court of Appeals, App. 57, *infra*; opinions of the Washington Supreme Court, App. 1, *infra*, on rehearing, App. 29, *infra*. Relevant briefing to the trial court is found at Appendix J, App. 82-89, *infra*.

The Seventh Amendment right to civil jury trials was addressed by the Washington Supreme Court, *see* Appendix B, App. 35-36, *infra*. Petitioners argued below that failure to reasonably inform a litigant "as to the basis for [a] motion for summary judgment . . . would . . . deprive [him] of his constitutional right of trial by jury." Petition for Review to the Washington Supreme Court, pp. 6-7, reproduced in Appendix H, App. 77, *infra*. The Washington Supreme Court cited a federal case, *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir.

1974), when it rejected Petitioners' civil jury trial arguments. *See* App. 36, *infra*. Thus the Seventh Amendment right at issue herein was in fact raised and addressed below.

The Fourteenth Amendment due process clause was raised in the Petition For Review to the Washington Supreme Court. *See* Appendix H. Petitioners argued that *Williams v. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986), supported their contention that due process required notice and an opportunity to be heard on the specific grounds pursuant to which summary judgment is granted or sustained. Appendix H.

Petitioners also argued to the Washington Supreme Court that "[a] party in answering a motion for summary judgment has a right to be reasonably informed as to the basis for the motion and a right to rely on those specific issues raised in the motion," raising Fourteenth Amendment due process clause issues by necessary implication. *See* App. 77, 36, *infra*.

STATEMENT OF THE CASE

A. Statement of Facts.

According to the statement of facts set forth in the Washington Supreme Court opinions, and other documents reproduced *infra* in the Appendices to this Petition, the pertinent facts are as follows:

On July 28, 1972, a misdemeanor complaint and information was filed in the Municipal Court for the Town of Westport, in Grays Harbor County, Washington.

App. 1-2. This complaint and information charged Lorraine LaMon with assaulting an employee of The Daily World with a hamburger at the restaurant operated by Mr. and Mrs. LaMon.[1] On August 15, 1972, Mrs. LaMon was found guilty of assault. App. 90-94.

Mrs. LaMon appealed her conviction to the Grays Harbor County Superior Court. Even though her attorney, Arthur L. Davies, had already been discharged by her, he stipulated to a dismissal of "the above action" "with prejudice." App. 42. As a matter of law, such dismissal operated to void the conviction entirely. App. 24, 62.

Although Betty Butler, a Daily World staff writer, knew that "the prosecution in the Superior Court . . . was dismissed" (App. 95), still, over the course of the next seven years, she published a series of articles in The Daily World stating that Lorraine LaMon had been convicted of assault in the Municipal Court in Grays Harbor County, Washington. These articles never mentioned the fact that the prosecution against Mrs. LaMon had been dismissed on appeal. *See* App. 29-31, 62.

Butler also published articles stating that a civil rights suit in which the LaMons were plaintiffs had been dismissed for being "frivolous," when in fact there was a substantial recovery. App. 23. Butler stated that the civil rights suit was "connected" with the alleged 1972 assault incident when, in fact, there was no connection whatever.

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[1] Charges were also filed against Edward LaMon. These were dropped on August 15, 1972, at the close of the prosecution's case.

See App. 23; Appendix O, *infra*. Mr. and Mrs. LaMon paid to publish a copy of the court's Findings of Fact in the civil rights action in The Daily World, before the misstatements were published by Respondents. Appendix O. Butler admitted to knowing about the advertisements. App. 55.

On September 24, 1981, Mr. and Mrs. LaMon filed suit against Betty Butler and The Daily World alleging, *inter alia*, that the false statements of fact contained in those articles defamed them, and caused harm to their reputation in the community. App. 3, 90-94. Respondents denied defaming Mr. and Mrs. LaMon, and asserted four affirmative defenses: truth, privilege, the statute of limitations, and that the LaMons were public figures. App. 98-99.

B. Procedural History of Case.

On or about October 11, 1983, Respondents moved for summary judgment of dismissal. The motion, reproduced at Appendix E, App. 71, *infra*, stated that summary judgment should be granted, based "on the following issues":

> (1) That plaintiffs are barred by the statute of limitations from asserting any claim or presenting any evidence for damages of any action of the defendants occurring prior to September 24, 1979.
> (2) That the plaintiffs are "public figures."
> (3) That the newspaper article attached as Exhibit 1 hereto which appeared in The Daily World on September 25, 1979 is not defamatory of the plaintiffs.
> (4) That plaintiff, Lorraine LaMon, was convicted in Westport Municipal Court of assault.
> (5) That a judgment of dismissal be [sic] granted.

The two pertinent issues raised by Respondents' motion for summary judgment were truth (number 4) and that the LaMons were public figures. The latter, of course, would not justify dismissal, but would give rise to a second hearing on the question of malice.

The issue of negligence was not raised by this motion. Respondents' memorandum of authorities, submitted with the motion, concluded as follows:

> We submit to the court that we have shown that the article that appeared in The Daily World was true, under operation of a privilege or a fair comment [sic] and report of a public proceeding, i.e., Westport City Council public meeting.

App. 88, *infra*. An additional issue, privilege, was raised by the brief.

Defense counsel submitted an affidavit in support of the motion for summary judgment. This affidavit argued that the articles in question were true and were privileged and that the LaMons were public figures. App. 77-81, *infra*.

By order dated December 22, 1983, the trial court granted the motion for summary judgment, dismissing the action with prejudice. The order, which was prepared by counsel for Respondents, did not state the basis for the decision. *See* App. 68-70, *infra*.

Mr. and Mrs. LaMon appealed that order to the Washington Court of Appeals. That court decided that Petitioners made a sufficient showing of falsity, which "in this case lies not in what was said but in what was left unsaid." App. 62. The court further acknowledged that

"the LaMons cannot be classified as public figures." App. 64. No appeal was taken from this ruling.

The appellate court concluded, however, that the LaMons were required by freedom of press considerations to prove fault "by evidence of convincing clarity," because of the status of the defendants. App. 65. For the LaMons' alleged failure to prove fault by convincing clarity at the summary judgment stage, an issue never addressed to the trial court, the Court of Appeals affirmed the trial court's order granting summary judgment.

The LaMons submitted a Petition for Review of the appellate court decision, asserting that they were deprived of reasonable notice and opportunity for hearing on the issue decided against them by the appellate court, which was not argued to the trial court; that such decision deprived them of their right to a civil jury trial; and that the "convincing clarity" standard was contrary to the First Amendment. Appendix H, *infra*.

On appeal to the Washington Supreme Court, a bare (5-4) majority affirmed, but, again, on alternate grounds not advanced to the trial court with the original motion for summary judgment. The majority acknowledged the appellate court holding that "the LaMons had succeeded in proving other elements of defamation by clear and convincing evidence, namely, falsity, defamatory meaning, and not privileged communication." App. 3. The majority added the following:

> Finally, this court has recently held that a defamation plaintiff's standard of proof depends on the status of the defendant. This standard of proof is "clear and convincing evidence" against a media defendant, and

> "a preponderance of the evidence" against a non-media defendant regarding private affairs.

App. 4, *infra*.

The Washington Supreme Court majority added that the LaMons did not controvert certain deposition testimony of Respondent Butler. The court stated that when "a non-moving party fails to controvert the facts supporting a summary judgment motion, those facts are accepted as true." App. 4, *infra*.

The facts accepted on that basis by the Washington Supreme Court consisted primarily of Betty Butler's description of her alleged inquiries into Lorraine LaMon's conviction. Butler testified at deposition that she spoke with the City Attorney, William Morgan, after Mrs. LaMon's conviction was dismissed, and that her impression of her discussions with Morgan lead her to believe that the order dismissing "the action" "with prejudice" did not affect the Municipal Court conviction. *See* App. 96, *infra*. Butler also testified, however, that she was aware that the prosecution against Mrs. LaMon had been dismissed. App. 95.

Butler and The Daily World had not argued to the trial court that there was no evidence of record contradicting Betty Butler's deposition testimony, and that such evidence was necessary to avoid dismissal of Petitioners' case. The Washington Court of Appeals, which affirmed on grounds not argued to the trial court, likewise never stated that evidence specifically contradicting Butler's testimony was necessary for the LaMons to proceed to trial, or that the lack thereof was the basis for *its* decision.

Rather, the appellate court held that "[t]he LaMons' evidence would not support a reasonable jury finding that they have shown negligence *by clear and convincing evidence.*" App. 65 (emphasis added).

The first Washington Supreme Court decision was therefore the *first* time the LaMons were notified that the absence of affidavits contradicting deposition testimony was the real reason they could not take their case to trial. Four Justices vehemently disagreed with this conclusion, stating that "[t]he LaMons clearly have enough evidence with which to proceed to trial," and that Butler's deposition testimony "strain[ed] credulity." App. 25, 27.

In response to the Washington Supreme Court holding, the LaMons petitioned for rehearing, and sought to supplement the record with the affidavit of William Morgan, the Westport City Attorney. Morgan categorically denied making the statements Betty Butler vaguely attributed to him. *See* Appendix F, App. 73, *infra*. The Washington Supreme Court granted rehearing but refused to consider the Morgan affidavit. App. 34-35, *infra*. It held that the Butler deposition testimony established due care. App. 34, *infra*. This issue was neither advanced to the trial court as a reason to dismiss the LaMons' case, nor adopted in either prior appellate court decision.

Thus, on rehearing, having refused to consider the Morgan affidavit, the sharply divided Washington Supreme Court again held that Mr. and Mrs. LaMon had failed to prove fault with the requisite clarity. The Washington Supreme Court majority also rejected Petitioners' argument that the use of grounds for decision which were

not argued to the trial court violated Petitioners' constitutional right to a civil jury trial. App. 36-37.

REASONS FOR GRANTING CERTIORARI

I. THE FIRST AMENDMENT DOES NOT DISTINGUISH BETWEEN MEDIA AND NON-MEDIA DEFENDANTS WITH RESPECT TO THE QUANTUM OF PROOF OF FAULT IN DEFAMATION CASES INVOLVING PRIVATE FIGURE PLAINTIFFS.

A. The Standard Of Proof Of Fault In Defamation Cases Does Not Depend Upon The Status Of The Defendant, Where The Plaintiff Is A Private Figure.

This Court has held that states may not impose defamation liability upon media defendants absent proof of fault, consistently with the First Amendment. *Gertz v. Welch*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974). This Court has also held that where the defamation plaintiff is a public figure or official, the First Amendment requires the plaintiff to prove constitutional malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964).

In *Jack Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986), this Court held that a public figure plaintiff must bring forward, in response to a summary judgment motion, sufficient evidence to permit a reasonable finder of fact to conclude that constitutional malice was established by convincing clarity. *Jack Anderson* does not apply here; the Washington Court of Appeals decided that Mr. and Mrs. LaMon are private

figures, and no appeal was taken from that decision. Thus Mr. and Mrs. LaMon were not required to prove malice with convincing clarity.

This Court has never decided the question whether the First Amendment requires a private figure plaintiff to prove fault in a defamation action against a media defendant by convincing clarity. Rather, this Court has intimated that the First Amendment *only* requires proof of fault; states are free to determine for themselves what additional proof, if any, is required in such an action. *Gertz v. Welch, supra*, 418 U.S. at 347, 41 L.Ed.2d at 809-10 ("so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individuals").

No decision of this Court permits states to require a higher degree of proof when *the defendant* is a newspaper than when the defendant is not, in defamation actions brought by *private* figure plaintiffs. Under *New York Times Co. v. Sullivan*, a distinction based on the *plaintiff's* status is permissible. But the Washington Supreme Court inverted *Sullivan*, and based standards of proof on the *defendant's* status. This was error.

The Washington Supreme Court apparently ignored this Court's admonition in *Gertz*, and, citing to a line of cases directly traceable to that case (App. 17), held that "the standard of proof is 'clear and convincing evidence' against a media defendant, and a 'preponderance of the evidence' against a nonmedia defendant regarding private affairs." App. 4, *infra*. The Washington Court of Appeals also held that a private figure must establish

fault against a media defendant "by evidence of convincing clarity." App. 64.

The dissent below criticized the majority's analysis, pointing out that *Gertz* and *Sullivan* make no distinctions between media and nonmedia defendants on the issue of fault, so long as proof of fault is required. App. 62, 65. In the ordinary case, the nonmoving party is entitled to all reasonable inferences, and must prevail if there is a genuine issue of material fact; no affidavits need be submitted if the movant fails to establish the absence of such fact issues. *Sea Farms, Inc. v. Foster & Marshall Realty*, 42 Wn.App. 308, 711 P.2d 1049 (1985). Thus if the Washington Supreme Court applied ordinary summary judgment standards here, as opposed to the incorrect heightened standard used because the defendants are media members, the outcome of this case would have been different.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985), this Court pointed out that the First Amendment does not support granting the media special protection beyond that available to private citizens. *See* 472 U.S. at 773 (White, J., concurring) ("it makes no sense to give the most protection to those publishers who reach the most readers . . . with the most misinformation"); 472 U.S. at 784 (Brennan, J., concurring) ("the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities").

Thus the Washington Court of Appeals and Supreme Court applied a standard of proof based upon the defendant's status, even though the LaMons are private

figures. This standard of proof is neither required by First Amendment principles nor permissible thereunder; a distinction between media and nonmedia defendants in such cases permits one person to publish falsehoods with impunity, while prohibiting another person (on pain of defamation liability) from making the identical statement, based solely on the defendants' status. *See* App. 18.

The distinction between media and nonmedia defendants in the law of defamation has been rejected by the Federal Courts of Appeal for the Eighth and Tenth Circuits. *In re IBP Confidential Business Documents Litigation*, 797 F.2d 632, 642 (8th Cir. 1986); *Garcia v. Board of Education*, 777 F.2d 1403, 1409-11 (10th Cir. 1985). This Court should reject this status-based distinction also.

B. Federal Law Controls The Disposition Of This Question.

The Washington Supreme Court did not clearly base its decision on alternate state grounds. *See* App. 17, 46. To deprive this Court of jurisdiction over the present questions, that Court would have to have clearly asserted such state constitutional grounds. *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1983).

Thus, while *Gertz v. Welch* arguably permits states to require higher standards of proof of fault based solely on state law grounds, the Washington Supreme Court did not do so. Rather, the majority's reliance on *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), and *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), both of which relied in turn on *New York Times v. Sullivan*

and its progeny, including *Gertz*, indicates reliance on federal, not state, standards of proof in dismissing Petitioners' cause of action. *See* App. 17, 46 ("this court's media distinctions rest upon 'policy reasons, rooted in the First Amendment' "), *citing Mark v. Seattle Times, supra.*

Even if the Washington Supreme Court relied on state law grounds for its decision alone, however, a sufficient federal question to confer jurisdiction on this Court is found in that court's improper distinction between defendants, based solely upon their status, in arriving at the burden of proof of fault required of private figure plaintiffs. The majority below used a double standard of proof regarding permissible speech, which is inconsistent with the First Amendment. *Dun & Bradstreet, supra;* U.S. Const., Art. III. The majority below would permit media defendants to publish falsehoods about private persons, absent "clear and convincing" evidence of negligence, whereas nonmedia defendants would be liable for an identical reputation-harming falsehood, if negligence could be established by a mere preponderance.

This Court should accept certiorari and review the present controversy, and hold that the distinction between media and nonmedia defendants is not consistent with the First Amendment to the federal Constitution, and that private figure plaintiffs are not required to prove fault by clear and convincing evidence, on motion for summary judgment, in defamation cases.

II. THE SEVENTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION IMPACT PRACTICE AND PROCEDURE ON A MOTION FOR SUMMARY JUDGMENT.

The Seventh and Fourteenth Amendments limit a court's authority to dismiss a properly filed and well-pleaded case. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320, 47 L.Ed. 194, 198, 23 S.Ct. 120 (1902); *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897); *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 209, 2 L.Ed.2d 1255, 1265, 78 S.Ct. 1087 (1965).

In certain cases, where the nonmoving party has no evidence to support his case or where the movant has a complete defense, summary judgment may be granted, dismissing a cause of action or an entire case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336, 58 L.Ed.2d 552, 99 S.Ct. 645, 654 (1979); Fed.R.Civ.P. 56. The power to dismiss a case is not, however, unlimited, even under Fed.R.Civ.P. 56. *Adickes v. Kress & Co.*, 398 U.S. 144, 153-161, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970); *see Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 621-22, 37 L.Ed.2d 207, 93 S.Ct. 2469 (1973).

In this case, dismissal of their defamation action violated the LaMons' Seventh and Fourteenth Amendment rights in four separate but related ways. These will be addressed in turn.

A. Due Process Requires A Trial Court To Set Forth The Basis For An Order Granting Summary Judgment.

The trial court did not set forth the basis for its decision granting summary judgment. *See* App. 68-70,

infra. Dismissal without stating grounds therefore deprived the LaMons of an opportunity to make a sufficient record (on motion for reconsideration or otherwise) for review, and deprived the reviewing court of a fair record for review. *See Wilson v. Volkswagon of America, Inc.*, 561 F.2d 494, 505 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (due process requires a trial court to fully set forth the basis for awarding sanctions against a party); *Societe Internationale, supra.*

B. Use Of Alternate Grounds To Sustain A Summary Judgment Order Violates The Nonmoving Party's Due Process Right To Notice Of The Basis For Dismissal Of His Case.

The Washington Supreme Court affirmed the trial court's decision on alternate grounds, which the "trial court did not consider." App. 36-37, *infra*. The reason that the trial court "did not consider" the ground on which the Washington Supreme Court majority upheld the dismissal is that the alleged lack of evidence contradicting Butler's deposition testimony was not argued to it. *See* Appendices E, I and J, *infra*.

Dismissal of a litigant's claims on an alternate ground not argued to the trial court deprives him of notice of the basis for dismissal of his case, at a time when there is a fair opportunity to respond. *See Addington v. Mid-American Lines*, 77 F.R.D. 720, 752 (D.Mo. 1978); *Societe Internationale, supra*. Notice is of course a cornerstone of due process. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); *Gloss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

In this case, the reviewing courts rejected every ground for summary judgment presented to the trial court, except for the statute of limitations, which did not bar the LaMons' claims as to two publications. Had the additional ground raised for the first time on appeal – lack of proof of due care – been addressed to the trial court, the LaMons could have submitted the Morgan and Wade affidavits to defeat the issue.

But the LaMons were never notified that lack of proof of due care could result in dismissal of their case, and therefore had no reason to obtain and submit those affidavits. Instead, the reviewing court determined on an incomplete record that the LaMons could not take their case to a jury. This conduct deprived the LaMons of due process of law.

C. The Washington Supreme Court's Refusal To Permit The LaMons To Present Evidence On An Issue Raised For The First Time In That Court Violated The LaMons' Seventh And Fourteenth Amendment Rights.

When the Washington Supreme Court notified the LaMons that the *sole* basis for upholding the dismissal of their case was the alleged absence of evidence contradicting Betty Butler's deposition testimony (and *not* the grounds stated and argued to the trial court by Respondents), that Court refused to permit the LaMons to supplement the record with contradicting affidavits. App. 34-35, *infra*. This refusal denied the LaMons of an opportunity to be heard on the factual basis for dismissing their case; the Washington Supreme Court thus raised the issue

itself, refused to permit the LaMons to submit affidavits addressing it, and dismissed the case.

Before a litigant may be deprived of his day in court by dismissal of his case, due process requires an "opportunity for a hearing on the merits of his cause." *Societe Internationale, supra,* 357 U.S. at 209, 2 L.Ed.2d at 1265.

To act consistently with the LaMons' Seventh and Fourteenth Amendment rights, the Washington Supreme Court should have remanded to the Grays Harbor County Superior Court, and given the LaMons the opportunity to be heard on the matter of proof of Butler's fault. The evidence submitted by the LaMons after the appellate tribunal raised the due care issue would have, at minimum, contradicted Butler's deposition testimony, thus requiring trial on the merits.

The Washington Supreme Court stated that fault had been addressed at the trial court level. App. 37. This is incorrect. The motion for summary judgment requested ruling on four issues. Appendix E. One of these issues was whether the LaMons were public figures. App. 71. Had the Respondents prevailed on that issue, a second hearing may have been required on the question of proof of malice. *See Jack Anderson v. Liberty Lobby, Inc., supra.* No suggestion is found in the motion or supporting documents submitted to the trial court that proof of fault was potentially dispositive. Thus the first time evidence of fault was brought forward as a basis for dismissal of the LaMons' case was at the appellate level. The Seventh and Fourteenth Amendments demanded that the LaMons be given an opportunity to be heard at that time. The rights provided by these amendments were denied the LaMons,

however, when the majority below utilized a Rule of Appellate Procedure to exclude the Morgan affidavit. App. 34-35.

D. The Seventh Amendment Requires Trial On The Merits Where Genuine Issues Of Material Fact Exist, As Here.

An order granting summary judgment violates a litigant's Seventh and Fourteenth Amendment rights where genuine issues of material fact exist. *See Robertson v. White*, 635 F.Supp. 851 (W.D.Ark. 1986); *Elliott v. Elliott*, 49 F.R.D. 283, 284 (S.D.N.Y. 1970); *cf. Cales v. Chesapeake & Ohio Ry. Co.*, 46 F.R.D. 36, 40 (D.Va. 1969). In this case, genuine issues of material fact render summary judgment inconsistent with the LaMons' Seventh and Fourteenth Amendment rights, even if the Morgan affidavit is not considered.

According to the deposition testimony relied upon by the Washington Supreme Court majority, Butler did not read the order dismissing "the action" against Mrs. LaMon. She spoke only with the court clerk and the prosecutor. The latter was adverse to the LaMons. Butler never asked either an attorney for the LaMons or Mrs. LaMon herself what the legal effect of the order dismissing "the action" was. Butler wrote numerous articles about Mr. and Mrs. LaMon, over a seven-plus year period, in which she disparaged their good name, after an incident in which a Daily World employee caused an altercation at the LaMons' business, indicating potential bias. In other articles published by Respondents, Butler disregarded a federal judge's Findings of Fact, of which

she was aware, and instead quoted the adverse attorney's closing argument, indicating the lengths to which she would go to create news stories adverse to the LaMons. App. 21-28, 52-56.

The evidence was overwhelming that Butler's articles were part of a long-standing, personal vendetta against Mr. and Mrs. LaMon.[2] (*See* Appendices L and M, *infra.*) Clear personal hostility, such as that presented by Butler's long history of misstatements regarding the LaMons, is relevant to the issue of fault. *See Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983).

In addition, the evidence accepted by the majority below as proof of due care was entirely uncorroborated. If a newspaperwoman is entitled to rely entirely upon an ambiguous statement of an interested attorney as proof of due care, that newspaperwoman should be required to support her claim with some corroboration that the conversation took place, and that the attorney (Morgan) made the statements attributed to him. App. 28, *infra.* In this case, Butler's claim that an attorney lead her to believe that an order dismissing the action with prejudice did not affect the original conviction "strains credulity." App. 28.

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[2] *See* Appendix P. Butler wrote in October, 1978, that the conviction "was upheld" on appeal. This statement was a known falsehood, even according to the deposition testimony, reproduced in Appendix M, in which Butler acknowledges knowing, six years earlier, that the appeal had been dismissed. App. 95.

Clearly, the summary judgment rules approved by this Court in Fed.R.Civ.P. 56 and *Celotex* were not intended to deprive a party of a jury trial, where such is appropriate.[3] *Pollar v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944); *see also Davis v. U.S. Government*, 742 F.2d 171 (5th Cir. 1984).

In *Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 37 L.Ed.2d 207, 93 S.Ct. 2469 (1973), this Court affirmed an order granting summary judgment in a Food and Drug Administration case involving new products. The Court noted, however, that "[i]f this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment, as our decisions reveal." 412 U.S. at 621-22, *citing Adickes v. Kress & Co.*, 398 U.S. 144, 153-161, 26 L.Ed. 2d 142, 90 S.Ct. 1598 (1970), *and White Motor Co. v. United States*, 372 U.S. 253, 9 L.Ed.2d 738, 83 S.Ct. 696 (1963). This Court has thus indicated, more than once, that the Seventh Amendment limits judicial power to dismiss a case on a motion for summary judgment.

This Court has indicated in recent terms that summary determinations are appropriate under a wider range of circumstances than previously approved. *See Celotex Corp. v. Catrett, supra.* But even in a *Celotex*-type summary judgment motion, where the motion need not be supported by affidavits, the nonmoving party is given

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[3] Washington's summary judgment rule is identical to the federal rule in all respects germane to this case.

notice of the specific grounds pursuant to which his case may be dismissed, and provided an opportunity to be heard on such grounds. If, after hearing, the facts or reasonable inferences arising therefrom present triable issues, the motion must be denied.

A key distinction between this case and *Celotex* is that the moving party's motion in this case listed *only* specific elements pursuant to which summary judgment could issue, and did *not* notify the LaMons that every element they would have to prove at trial was open to dispute. *See* Appendix E. A litigant has a right to notice that every element of his case is at issue before he may be required, on pain of dismissal, to obtain affidavits addressing every conceivable argument against him. U.S. Const., Amends. VII, XIV; *Williams v. City of St. Louis, supra.*

Petitioners submit that this case presents important issues of first impression related to the limitations imposed by the Seventh and Fourteenth Amendments to the federal Constitution on summary judgment practice and procedure. This Court is respectfully requested to grant certiorari, and to resolve these important questions.

CONCLUSION

All the LaMons seek is their day in court. The courts below denied them their day in court by applying the wrong First Amendment standards, and by relying on deposition testimony that "strains credulity" without providing notice or opportunity for hearing on issues raised by such testimony.

This Court is respectfully requested to issue a writ of certiorari to the Washington Supreme Court, and reverse its decisions therein.

Respectfully submitted,

JOHN R. QUINLAN*
MILTON G. ROWLAND

Of -
PAINE, HAMBLEN, COFFIN,
BROOKE & MILLER
1200 Washington Trust
Financial Ctr.
Spokane, Washington 99204
(509) 455-6000

Counsel of Record for Petitioners

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

EDWARD LaMON and LORRAINE LaMON, husband and wife, Petitioners, v. BETTY BUTLER, and THE DAILY WORLD, a corporation, Respondents.	)	No. 53196-0 En Banc

(Filed March 10, 1988)

DURHAM, J. – The plaintiffs in this case sued a newspaper and one of its reporters for allegedly defamatory statements appearing in its news articles. The trial judge dismissed the plaintiffs' cause of action by summary judgment. The Court of Appeals affirmed, holding that the plaintiffs had failed to make a prima facie showing of the defendants' fault. Although our analysis differs somewhat from that of the Court of Appeals, we also affirm the trial court's decision.

On July 2, 1972, an altercation took place between Lorraine LaMon and John Peterson. Both Lorraine LaMon and her husband, Edward, were charged with assault. Edward LaMon's count was dismissed at trial, but Lorraine LaMon was convicted in the Westport Municipal Court. Lorraine LaMon appealed to the Grays Harbor County Superior Court. That appeal was dismissed by stipulation of the parties on November 10, 1972. The order of dismissal states that the superior court action

was dismissed with prejudice, but it does not expressly state what effect the dismissal would have on the lower court conviction. For purposes of this opinion, however, we assume that the lower court conviction was indeed negated.

At that time, Betty Butler was responsible for reporting news in the Westport area for The Daily World, a newspaper of general circulation in Grays Harbor County. Butler learned of the superior court's dismissal of Lorraine LaMon's appeal by calling the county clerk's office. A clerk there read the order to Butler over the telephone. Butler discussed the effect of that order with the Westport city attorney involved in Lorraine LaMon's appeal. The city attorney told her that the dismissal did not negate the municipal court conviction.

Based on her understanding of these events, Butler wrote at least five articles between 1974 and 1980 in which she mentioned Lorraine LaMon's municipal court conviction without also mentioning the superior court dismissal.[1] Those articles did not focus primarily on Lorraine LaMon's assault conviction, but instead concerned the status of related litigation. In that related litigation,

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[1] The five articles were dated August 13, 1974, September 15, 1975, September 11, 1979, September 25, 1979 and April 17, 1980. Because the first three articles were published more than 2 years before the LaMons filed their complaint, the statute of limitations bars any action on them. *See* RCW 4.16.100(1). The other two articles are the focus of this case.

Additionally, Butler helped to write a story that appeared in The Daily World on October 20, 1978, which stated that Lorraine LaMon's conviction was upheld on appeal. The 2-year statute of limitations prevents any action on this article as well.

the LaMons sued the Westport police chief, John Regan, for false arrest arising out of the assault incident and for a failure to provide proper police protection to the LaMons over a number of years.[2] Butler's references to the assault conviction were used as background material in explaining the LaMon-Regan litigation.

The LaMons filed a complaint for defamation against Butler and The Daily World in Grays Harbor County Superior Court on September 24, 1981. The LaMons alleged that Butler's articles were defamatory by implying that Lorraine LaMon remained convicted of assault. Prior to trial, the LaMons unsuccessfully attempted to disqualify two Superior Court judges by filing affidavits of prejudice. Ultimately, Judge Kirkwood entered a summary judgment in favor of the defendants on December 22, 1983, dismissing the LaMons' cause of action. The Court of Appeals affirmed the dismissal, holding that the LaMons had failed to make a sufficient prima facie showing of the defendants' fault.[3] We granted the LaMons' petition for review.

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[2] The LaMons also named John Peterson as a defendant in that action, alleging that he executed an "erroneous and false" assault complaint against them. Peterson was later dismissed from the case on the motion of the LaMons.

[3] The Court of Appeals also concluded that the LaMons had succeeded in proving other elements of defamation by clear and convincing evidence, namely, falsity, defamatory meaning, and unprivileged communication. Because we hold that there was no triable issue as to the defendants' fault, we need not address the Court of Appeals discussion of the other elements.

SUMMARY JUDGMENT

Washington case law has set out certain principles to be applied in defamation cases. A defamation plaintiff must prove the following elements: a defamatory and false statement, an unprivileged communication, fault, and damages. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982); *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 233, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979); Restatement (Second) of Torts § 558 (1977). If the plaintiff is a public figure or public official, then the level of fault that he must show is actual malice. If, on the other hand, the plaintiff is a private figure, then he need show only negligence. *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976). Finally, this court has recently held that a defamation plaintiff's standard of proof depends on the status of the defendant. The standard of proof is "clear and convincing evidence" against a media defendant, and "a preponderance of the evidence" against a nonmedia defendant regarding private affairs. *See Guntheroth v. Rodaway*, 107 Wn.2d 170, 175-76, 727 P.2d 982 (1986); *Dunlap v. Wayne*, 105 Wn.2d 529, 534-35, 716 P.2d 842 (1986); *Mark*, at 486-87.

The parties have presented numerous arguments as to the proper application of these principles. The LaMons have argued they are private figures, while The Daily World has argued they are public figures. The LaMons challenged the media/nonmedia distinction as violating First Amendment principles. An amicus curiae brief filed on behalf of Allied Daily Newspapers has proposed that this court apply the higher standard of proof to issues of public concern and the lower standard to issues of

private concern. However, because our holding does not require resolution of these questions, we decline to address them. Even if we were to agree with the LaMons' position on all these issues, they would still have the burden at summary judgment of showing by a preponderance of the evidence that Butler and The Daily World acted negligently. This they have failed to do.

[1] When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements of defamation. *See Guntheroth*, at 175; *Dunlap*, at 542; *Mark*, at 486. The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); *Guntheroth*, at 175. The nonmoving party is entitled to have the evidence viewed in a light most favorable to him and against the moving party. *Herron*, at 170.

The only evidence the LaMons have submitted to show the defendants' negligence is Lorraine LaMon's affidavit, in which she concludes that Butler knew that the statements were false because the order of dismissal was read to her over the telephone. Lorraine LaMon implies that Butler should be charged with knowledge of the order's contents, and we agree. However, the order of dismissal does not on its face give any indication of its effect on the municipal court conviction. The order indicates only that the superior court action is dismissed. The most that can be said is that reading the order would put one on notice to inquire further. The record shows, however, that Butler did, in fact, inquire further. She

discussed the order with the city attorney involved in the case. According to Butler's deposition, the city attorney told her that the superior court dismissal did not affect Lorraine LaMon's conviction. Accordingly, Butler had no way of knowing that her statements were incorrect.

[2] These facts do not constitute a prima facie case of negligence, even if we consider all the evidence and all the reasonable inferences from the evidence in favor of the LaMons. The LaMons are not entitled to an inference that the city attorney might have told Butler something other than what Butler now remembers. The LaMons did not present any evidentiary material to controvert Butler's version of the city attorney's statements. When a nonmoving party fails to controvert the facts supporting a summary judgment motion, those facts are accepted as true. *See Washington Osteopathic Med. Ass'n v. King Cy. Med. Serv. Corp.*, 78 Wn.2d 577, 579, 478 P.2d 228 (1970); *see also Zurita v. Virgin Islands Daily News*, 578 F. Supp. 306, 309 (D.V.I. 1984); *Hideout Records & Distribs. v. El Jay Dee, Inc.*, 601 F. Supp. 1048, 1053 (D. Del. 1984) (and cases cited therein). A reasonable trier of fact could reach but one conclusion from this evidence: the defendants did not act negligently. Accordingly, the LaMons did not present a prima facie case on the issue of fault, and summary judgment was properly entered against them.[4]

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[4] Our decision today does not violate the LaMons' constitutional right to a jury trial. Const. art. 1, § 21. We are well aware that summary judgment decisions should not involve the resolution of factual issues. Such is the province of the fact finder at trial. Yet, Washington courts have held many times

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SCOPE OF ISSUES ON APPEAL

The LaMons have argued that it would be unfair for their case on appeal to be decided on the issue of fault. They contend that they did not have notice that the summary judgment hearing would include the issue of fault, because neither the trial judge nor the defendants addressed it below. They conclude that it would be unfair for this court to decide the appeal on the fault issue when it was not argued below.

We find this argument to be without merit. First, the LaMons were furnished with notice that they had to present a prima facie case on the issue of fault in order to survive the defendants' summary judgment motion. The defendants' memorandum in support of summary judgment quoted the following language from *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982):

> Under our cases, a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages. To make out a

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that summary judgment should be granted when reasonable persons, giving all reasonable inferences to the nonmoving party, could only conclude that the moving party is entitled to judgment. In such cases, there is no genuine issue of material fact. *See, e.g., Wilson v. Steinbach*, 98 Wn.2d 434, 437 656 P.2d 1030 (1982); *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). When there is no genuine issue of material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial. *See Nave v. Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966), *appeal dismissed*, 385 U.S. 450 (1967); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974).

> prima facie case for purposes of avoiding a summary judgment in favor of respondents, Mark would have to allege as to each element facts which would raise a genuine issue of fact for the jury.

(Citations omitted.) *Mark*, at 486. By reading this memorandum, the LaMons received notice that if they did not present evidence on the issue of fault, they ran the risk of summary judgment being entered against them.

[3] Second, an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). The pleadings establish a defamation cause of action, an essential element of which is the defendants' fault. Therefore, dismissal for a failure to satisfy the burden of proving fault is based on a theory established by the pleadings. Furthermore, this theory is supported by proof in the record, most notably Butler's deposition, which was uncontroverted by the LaMons. We conclude that the fault issue was properly before us.

AFFIDAVITS OF PREJUDICE

The final issue in this case concerns affidavits of prejudice. Affidavits of prejudice are the means by which litigants in this state can prevent a judge who they perceive to be biased from hearing their case. Affidavits of prejudice are governed by RCW 4.12.040 and 4.12.050, which provide in relevant part:

> No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any

> party or attorney, or the interest of any party or attorney appearing in such cause. . . .

RCW 4.12.040.

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge . . .

RCW 4.12.050.

We have summarized the effect of these statutes as follows:

> Under these statutes and under our decisions a party litigant is entitled, as a matter of right, to a change of judges upon the timely filing of a motion and affidavit of prejudice against a judge about to hear his cause or any substantial portion thereof on the merits. Such a motion and affidavit seasonably filed presents no question of fact or discretion. Prejudice is deemed to be established by the affidavit and the judge to whom it is directed is divested of authority to proceed further into the merits of the action.

State v. Dixon, 74 Wn.2d 700, 702, 446 P.2d 329 (1968).

However, the right to file affidavits of prejudice is not unlimited: "[N]o party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040." RCW 4.12.050.

In this case, Lorraine LaMon filed an affidavit of prejudice against Judge Kirkwood and Edward LaMon

filed an affidavit of prejudice against Judge Schumacher.[5] The LaMons argue that because they are each parties, they each have independent rights to file affidavits of prejudice under RCW 4.12.050.

[4, 5] Analysis of this issue revolves around the interpretation of "party" in RCW 4.12.050. Are co-plaintiffs each parties to an action, or instead, do they together constitute one party? This is apparently an issue of first impression in this state. The term "party" is not defined in RCW 4.12.050. However, one of the definitions of "party" in Black's Law Dictionary reads as follows:

> "Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, *the party plaintiff or defendant, whether composed of one or more individuals* and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.

(Italics ours.) Black's Law Dictionary 1010 (5th ed. 1979).[6] Under this definition, the LaMons together would constitute a single party.

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[5] The record does not disclose the disposition of the affidavit filed against Judge Schumacher. Since Judge Kirkwood ultimately ruled on the case, he evidently refused to recuse himself.

[6] Black's Law Dictionary also provides a less restrictive definition of "party", which reads:

> A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A "party" to an action is a person whose name is

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> This same result has been reached by the Oregon Supreme Court when interpreting a statute similar to ours. The Oregon statute provided that "no party or attorney shall be permitted to make more than two applications in any action or proceeding under this act." *U'Ren v. Bagley*, 118 Or. 77, 85, 245 P. 1074, 46 A.L.R. 1173 (1926) (quoting section 45-3, Oregon Laws). The Oregon Supreme Court interpreted the term "party" in this statute in the following manner:
>
> > "Party" means either plaintiff or defendant, and includes all persons belonging to the particular class: 40 Cyc[lopedia of Law and Procedure] 146 [(1912)]. "Party" is used in a collective sense and if there be a plurality of plaintiffs, they are all only one party litigant.
>
> *U'Ren*, at 85. *See also* 46 Am. Jur. 2d *Judges* § 212 (1969).

We find this holding to be persuasive. If we were to hold that each plaintiff and each defendant were entitled to file an affidavit of prejudice, then scores of judges could be disqualified in a single case. The Legislature could not have intended that result. Statutes must be interpreted so as to avoid absurd results. *General Tel. Co. v. Utilities & Transp. Comm'n*, 104 Wn.2d 460, 471, 706 P.2d 625 (1985). Therefore, we hold that the language of RCW 4.12.050 limits co-plaintiffs or co-defendants to the filing

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> designated on record as plaintiff or defendant. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment.

(Citation omitted.) Black's Law Dictionary, at 1010. As we explain later in this opinion, we decline to use such an expansive definition of "party" in construing RCW 4.12.050.

of a single affidavit. The LaMons were only entitled to file a single affidavit of prejudice.[7]

The trial court's decision is affirmed.

BRACHTENBACH, ANDERSEN, and CALLOW, JJ., concur.

DOLLIVER, J., concurs in the result.

UTTER, J. (dissenting) – I dissent on two grounds. First, this court should unequivocally reject the distinction between media/nonmedia defendants in determining the applicable standard of proof in libel cases. The majority states that the standard of proof depends upon the status of the defendant: "clear and convincing evidence" against a media defendant and "preponderance of the evidence" against a nonmedia defendant. Majority, at 220. To perpetuate this distinction, even while stating that it would not make any difference in deciding this case,

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[7] The LaMons argue that even if they were entitled to file only one affidavit of prejudice, then Judge Kirkwood should have disqualified himself upon receiving Lorraine LaMon's affidavit of prejudice. The premise underlying this argument is that Judges Schumacher and Kirkwood should have given priority to Lorraine LaMon's affidavit of prejudice, presumably because the cause of action was more hers than Edward's. However, there was no reason for the judges to do so. Both of the LaMons were named as plaintiffs in the case; therefore, either one had the right to file the single affidavit to which they were jointly entitled. Because they each had this right, the judges had no way of knowing which affidavit was controlling. There is no evidence in the record to show that the LaMons indicated that one affidavit had priority over the other. Accordingly, we cannot conclude that Judge Kirkwood erred in hearing this case.

majority, at 221, only lends confusion to an area of law that desperately needs greater clarity.

Second, I believe that the LaMons have presented sufficient evidence of fault to overcome defendant's motion for summary judgment. I concur with the conclusions reached on these arguments by Justice Dore in his dissenting opinion and offer further arguments in support of them here.

I

In affirming the trial court's decision to grant defendants' motion for summary judgment, the Court of Appeals held that "[a] defamation plaintiff resisting a *media* defendant's motion for summary judgment must establish a prima facie case by evidence of *convincing clarity*." (Some italics mine.) *LaMon v. Butler* 44 Wn. App. 654, 657, 722 P.2d 1373 (1986). While noting correctly that this standard of proof was not required by the United States Supreme Court, the Court of Appeals reasoned from recent opinions of this court that media defendants have greater protection than ordinary citizens similarly engaged in the exercise of First Amendment rights. *LaMon*, at 657 (citing *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986)). Such a conclusion is not warranted and should be corrected.

There are three problems with the media/nonmedia distinction in our current approach to standard of proof issues in libel law. Each of them strongly suggests that the distinction should be dropped.

A

SULLIVAN STANDARDS MISCONSTRUED

First, to the extent that the heightened standard of proof came to be applied as a result of state court interpretations of United States Supreme Court decisions, those decisions have been misconstrued. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964), the Court held that in defamation cases where the plaintiff is a public official, a prima facie case must be established with evidence of "convincing clarity", including a showing of actual malice. *Sullivan*, at 285-86. This twin standard of actual malice and convincing clarity was later extended to cases where the plaintiff is a "public figure". *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). We adopted these standards of fault and proof for public figure plaintiffs in *Grayson v. Curtis Pub'g Co.*, 72 Wn.2d 999, 436 P.2d 756 (1967). While only the plurality of the Court would have extended this twin standard to comments about private individuals which pertained to matters of "general public interest", *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971), this state nonetheless adopted the *Sullivan* standard for such comments because we felt constitutionally bound to follow the *Rosenbloom* plurality. *Miller v. Argus Pub'g Co.*, 79 Wn.2d 816, 490 P.2d 101 (1971).

However, in reconsidering the issue 3 years later, the United States Supreme Court held that the *Sullivan* standards were not constitutionally mandated when the plaintiff was a private individual; hence, the states were free to provide greater protection to defamed private

individuals than to public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). Once again following the cue from United States Supreme Court, Washington modified the standard for private person plaintiffs in defamation actions against the media. In *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), this court overruled *Miller*. We stated that the *Sullivan* standard of liability "imposes a totally unacceptable burden" when applied to private plaintiffs and that, henceforth, such plaintiffs need only show ordinary negligence. *Taskett*, at 444.

Taskett expressly addressed only one aspect of the *Sullivan* twin standard, that of fault. The substantive evidentiary standard to be applied was left unstated. However, the logic which compelled us to adopt a lesser standard of liability for actions by private plaintiffs strongly suggests that the standard of proof should likewise be lower. To have the nature of the plaintiff determine the standard of liability but have the status of the defendant determine the standard of proof is confusing and inconsistent. Yet this is where our case law currently stands.

The higher standard of convincing clarity has occasionally been applied by state courts to suits by private persons even though the case authority applying this standard involved public officials or public figures. The first case applying this standard to a private individual was *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979). There the court stated that a plaintiff must present evidence "of a sufficient quantum to establish a prima facie case with convincing clarity." *Sims*, at 237.

While following *Taskett* insofar as the standard of fault to be applied, the court applied the *Sullivan* standard of proof, even though Sims was a private citizen and traditionally entitled to greater protection of his reputation than a public figure. To support its application of the convincing clarity standard rather than that of simple preponderance, the court cited two Washington cases – *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973) and *Exner v. AMA*, 12 Wn. App. 215, 529 P.2d 863, 75 A.L.R.3d 603 (1974). However, both of these cases involved plaintiffs who were public figures for whom the application of the *Sullivan* standards of fault and proof was constitutionally compelled.

The application of this heightened evidentiary standard was later challenged by the private plaintiff in *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982), but the argument was rejected by this court. We stated then that for "policy reasons, rooted in the First Amendment . . . an early testing of plaintiff's evidence by a convincing clarity burden continue to be persuasive." *Mark*, at 487. *Chase* was again cited as the source for this rule.

The last case in this evolution was *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986). There we noted for the first time that the cases applying the "convincing clarity" standard had involved media defendants (although it is equally accurate to say that those cases, with the exception of *Sims* and *Mark*, involved plaintiffs who were either public officials or public figures) and that "First Amendment concerns at that time supported the special protection that we extended . . . " *Dunlap*, at 534. The court suggested that the same First Amendment

concerns were not implicated when a nonmedia defendant was being sued for a statement about private affairs; thus, whenever a nonmedia defendant was involved "the usual rules governing summary judgment should control", presumably including a simple preponderance of the evidence standard. *Dunlap*, at 535. This media/nonmedia defendant distinction in defamation actions was reiterated without comment in *Guntheroth v. Rodaway*, 107 Wn.2d 170, 176, 727 P.2d 982 (1986) and is repeated in the majority opinion in the current case.

Thus, the convincing clarity standard of proof came to be applied in libel suits against media defendants as a result of mistaken interpretations of United States Supreme Court decisions.

B

CURRENT DISTINCTION IS CONTRARY TO THE FIRST AMENDMENT

Second, the media/nonmedia defendant distinction in defamation actions by private individuals is contrary to the First Amendment. Since this court's media defendant distinction currently rests upon "policy reasons, rooted in the First Amendment", *Mark*, at 487, it is important to consider that a clear majority of the Justices on the United States Supreme Court and several federal courts addressing the issue have stated that the First Amendment does *not* support granting the media special protection beyond that available to individual citizens. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985), five Justices signed separate opinions explicitly concluding that the First Amendment requires the equal treatment of media

and nonmedia defendants and a sixth, Chief Justice Burger, agreed with this conclusion. Justice White was emphatic in opposing any media/nonmedia distinction in defamation law.

> None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn. It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers . . . with the most misinformation and do the most damage to private reputation.

(Footnote omitted.) *Dun & Bradstreet*, at 773 (White, J., concurring).

In a dissenting opinion joined by three other members of the Court, Justice Brennan stated categorically that a media/nonmedia distinction in defamation law is

> irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . "

Dun & Bradstreet, at 781, quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). Justice Brennan further emphasized the problems in defining "media" and suggested that any definition would soon become obsolete. Thus, he concludes that in the context of defamation law,

> the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.

Dun & Bradstreet, at 784.

A clear majority of the United States Supreme Court unequivocally rejects any media/nonmedia distinction in

libel law. This conclusion has since been strongly supported by two federal appellate courts. *Garcia v. Board of Educ.*, 777 F.2d 1403, 1409-11 (10th Cir. 1985); *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986). The message is now loud and clear: distinguishing between media and nonmedia defendants in libel cases is contrary to the First Amendment. We should not continue to hold otherwise.

C

WASHINGTON CONSTITUTION

Third, even assuming that the states can give greater protection to media than to nonmedia defendants without violating either the First or Fourteenth Amendments, it has not been determined whether the Washington Constitution does in fact provide for such a distinction. In *Dunlap*, this court noted that "the Washington Constitution may provide heightened protection to media defendants." *Dunlap*, at 534 n.1 (citing Const. art. 1, § 5 and *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984)). In the present case, this issue was not raised before the Court of Appeals. But that court nonetheless concluded from its evaluation of Washington case law and the footnote in *Dunlap* that the Washington Constitution "*does* provide heightened protection to media defendants". (Italics mine.) *LaMon*, at 657 n.2.

Such a definitive statement by the Court of Appeals is unwarranted. First, the language of article 1, section 5 is hardly unambiguous on this point. There is no differentiation between freedom of speech and press and, hence, no clear grounds for distinguishing levels of protection

for comments from media and nonmedia sources. Second, the footnote cited in *Dunlap* goes only so far as to suggest that article 1, section 5 *may* provide heightened protection to the media in defamation cases. However, it was only a suggestion, was not essential to the holding in the case, and, most importantly, has never been raised in arguments before this court. Third, the special protection provided by the "convincing clarity" evidentiary standard has not been sought by the media defendants in this case as a state constitutional right; it is the petitioners who raise the issue on appeal claiming that the state constitution affords no such enhanced protection. To allow the language of the Court of Appeals to stand granting state constitutional protection to the media which is not granted to individual citizens of the state is highly unsatisfactory. The media defendant has not urged its adoption and this court has not been presented with any arguments using the nonexclusive criteria of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), or other reasons mandating heightened state constitutional protection.

The media/nonmedia defendant distinction in our defamation law should be dropped. The appropriate evidentiary standard should be governed solely by the nature of the plaintiff, in the same manner that we determine which standard of liability to apply. A public figure plaintiff would therefore need to prove actual malice by clear and convincing evidence and a private person would only need to show negligence by simple preponderance of the evidence. The status of the defendant is irrelevant.

It is altogether proper to make the nature of the plaintiff the determining factor. The two basic rationales

for the strict *Sullivan* standards are the need to promote vigorous and robust debate on matters and personalities affecting public policy and the ability of public figures to use the media to rebut false statements made about them. Neither of these rationales is implicated when a libel suit is brought by a private person.

Abolishing the media/nonmedia distinction would be consistent with recent decisions of the United States Supreme Court and federal courts of appeal which have clarified the standards since our earlier cases. It would also be consistent with this court's reasoning in *Taskett* where it adopted "ordinary negligence" as the standard of fault for defamation cases involving a private person suing a media defendant.

The distinction between media and nonmedia defendants is faulty and should no longer be employed. I believe that "the best way forward is to take two steps back" and correct our mistake. The proper standard of proof in any libel action should depend solely on the nature of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Otherwise we perpetuate a body of law under which two defendants engaged in the same conduct may suffer vastly different penalties simply because one is a member of the media and the other is not.

II

The Court of Appeals determined, and the majority does not disagree, that the LaMons are private persons for purposes of this litigation. Thus, they would be entitled to recover if they can show by a preponderance of

the evidence that the statements made about them were false, had a defamatory meaning, were made negligently by the defendant, and were not otherwise privileged communication. *See Guntheroth*, at 175; *Dunlap*, at 542. As the nonmoving party in a summary judgment proceeding, the LaMons are further entitled to have the evidence and all reasonable inferences construed in the light most favorable to them and against the defendants. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987). Applying the appropriate evidentiary standard, I believe that the LaMons have presented a prima facie case and are entitled to proceed to trial.

The Court of Appeals concluded that the LaMons had provided sufficient evidence to show all the elements of defamation except defendants' fault. That court ruled that the LaMons had not made a prima facie showing of negligence and upheld summary judgment for the defendants. On this basis alone the majority affirms the decision.

The issue before us is whether there is sufficient evidence from which a trier of fact could reasonably conclude that defendants Butler and The Daily World *"knew or, in the exercise of reasonable care, should have known"* that the statements made about the LaMons were false. *Taskett*, 86 Wn.2d at 445. While the majority, like the Court of Appeals, examines only the statements made regarding the assault conviction, the LaMons' cause of action actually rests upon three allegedly defamatory statements. In addition to the false statements regarding the convictions, Butler and The Daily World are alleged to have made false statements to the effect that the LaMons'

civil rights litigation against the police chief was dismissed in federal cou. for being "frivolous" when in fact there was a substantial recovery, and to the effect that the civil rights suit was "connected" with the alleged assault incident when, in fact, there was no connection whatsoever.

These statements were made not once, but over the course of several years. Butler continued to make these statements even *after* the LaMons had notified her and The Daily World of their falsity. Although the statute of limitations limits the LaMons' suit to those statements published in September 1979 and April 1980, the record contains several other articles published before then containing the same defamatory remarks. The false statements that were made shortly after the reversal of LaMon's assault conviction may well have been the result of honest mistake. The LaMons are nonetheless entitled to argue that it is at least negligent and perhaps reflects actual malice when the defendant reporter and newspaper persist in printing the same mistaken and defamatory comments for 7 years.

The strongest basis for the LaMons' action lies in the false reporting of an assault conviction in municipal court that was later reversed by dismissal in superior court. Butler stated that after she heard of the superior court order dismissing the action against the LaMons, she did not know its effect on the municipal court conviction. However, Butler did not take the time to read the order herself. Butler Deposition, at 13. Had she done so, she would have noted that the superior court judge ordered that the "above action be dismissed with prejudice"; and that the "above action" clearly referred to the City of

Westport's assault charges against the LaMons, not merely the appeal of the municipal court conviction. Clerk's Papers, at 66.

Although our law has since changed, the rule had been well established at the time the order was issued that dismissal of a superior court action voids a prior municipal conviction. *See State v. Buckman*, 51 Wn.2d 827, 322 P.2d 881 (1958). The majority's characterization of the superior court order as a "dismissal of Lorraine LaMon's appeal" is inexplicable when the language of the order is given its plain and simple meaning. Majority, at 218.

Butler asserts that she contacted the Westport city attorney regarding the implications of the dismissal. According to her unsupported recollection of the conversation, the city attorney told her that the original municipal court conviction still stood despite the superior court's dismissal of the case. Butler Deposition, at 13-14. The majority is correct in stating that the LaMons offer no direct evidence that this conversation did not take place or that the city attorney said something other than what Butler now recalls. However, the LaMons have submitted evidence that it was the city attorney himself who initially proposed the order dismissing the case against them. Clerk's Papers, at 63. It is at least arguable that the same city attorney who proposed dismissing the case against the LaMons in the first place would not later tell a reporter that the assault conviction was not affected. This evidence and the reasonable inference from it presents a genuine issue of material fact sufficient to overcome the defendants' motion for summary judgment. For this reason we cannot accept Butler's version of events at face value.

The two other false statements made by the defendants in the publications at issue here further suggest that the LaMons have an adequate factual basis for their complaint. Butler continued to write that the LaMons' civil rights action against the police chief was dismissed as being "frivolous", despite knowing that in fact the LaMons were successful in their suit in federal district court. In this instance, Butler cannot claim to have been unaware of the true facts of the case. The LaMons had earlier paid for several large advertisements, published in the same newspaper, reprinting verbatim the findings of fact and judgment of the federal district court granting them relief and the memorandum opinion of the Ninth Circuit Court of Appeals affirming the judgment. Clerk's Papers, at 41. Butler admitted in her deposition that she knew of the advertisements. Butler Deposition, at 35. In addition, Butler falsely reported that the civil rights action "stemmed from" and was "connected with" the assault conviction. She later admitted in deposition that she knew that the basis for the LaMons' suit against the police chief was a denial of equal protection and had nothing to do with the prior municipal court conviction. Butler Deposition, at 27-28.

It is difficult to reconcile these facts with the majority's conclusion that no trier of fact could reasonably find the defendants at fault. The LaMons clearly have sufficient evidence with which to proceed to trial. The Court of Appeals decision should be reversed and the case remanded for trial.

PEARSON, C.J., and GOODLOE, J., concur with UTTER, J.

DORE, J. (dissenting) – The majority holds that the LaMons have not established a prima facie case of negligence with respect to this defamation action, and therefore uphold a summary judgment motion dismissing the case. I believe that whether or not such negligence was present is a question of fact, which cannot be resolved by summary judgment. I dissent, as I would remand this case for trial to decide whether or not Butler and The Daily World were negligent when publishing the false and defamatory statement in their newspaper.

PROPER STANDARD OF REVIEW

The majority opinion implicitly supports a position that "a defamation plaintiff's standard of proof depends on the status of the defendant." Majority, at 220. The majority holds that a plaintiff must present a prima facie case with "clear and convincing" evidence against a media defendant, but only by a "preponderance of the evidence" against nonmedia defendants. While admittedly the majority states that the LaMons cannot even meet the preponderance of evidence standard of proof – a result I believe is clearly wrong – its failure to clarify this issue of the proper standard of review is inexcusable considering the recent United States Supreme Court case in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985). In *Dun & Bradstreet*, five justices explicitly held that any distinction between media and nonmedia defendants violated the First Amendment. *Dun & Bradstreet*, 472 U.S. at 765, 773 (White, J., concurring), 472 U.S. at 774, 781 (Brennan, J., dissenting). Subsequent federal courts, following the decision in *Dun & Bradstret*, have rejected this media/

nonmedia distinction. *See Garcia v. Board of Educ.*, 777 F.2d 1403, 1409-10 (10th Cir. 1985); *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986).

Therefore, if the evidence presented by the LaMons, and all reasonable inferences which can be drawn from that evidence, establishes a prima facie case of defamation by a preponderance of the evidence, the motion for summary judgment should be denied. I believe that in this case such a prima facie cause of action has been established.

Negligent Conduct

The majority concludes that the LaMons have not established that Butler acted negligently. I disagree. Butler asserts that after she was read the superior court order, she did not know its effect on Lorraine LaMon's municipal court assault conviction. She further asserts that she then contacted the Westport City Attorney's Office, which supposedly informed her that the Superior Court's dismissal did not affect the original assault conviction. I find this explanation strains credulity, and I believe that a trial is required to determine whether Butler was negligent.

The superior court order dismissing the municipal court action read as follows:

> This cause coming on for hearing on motion of the defendants by and through their attorney of record, . . . to dismiss the action and the same being stipulated by counsel, [attorneys] for plaintiff, and the Court being fully advised in the premises, it is ordered that the said motion be and the same is hereby granted: It is ordered that the above action be

> dismissed with prejudice. It is further ordered, adjudged and decreed that the defendants pay all costs in the matter.

Clerk's Papers, at 66. I do not believe that any lawyer could read this order and not conclude that the original conviction was reversed. Either Butler has fabricated the results of her conversation with the Westport City Attorney's Office, or she mischaracterized the order when she talked with that office. In either event, a fact finder could certainly find her actions negligent, and this case should therefore not be disposed of by summary judgment.

Conclusion

I dissent to the majority opinion. I believe the majority fails to clarify the proper standard of proof which the LaMons must meet to resist the motion for summary judgment. I would hold that there is a genuine issue of fact as to whether Butler's conduct was negligent. I would remand for trial.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD LaMON and LORRAINE LaMON, husband and wife,	)	No. 53196-0
Petitioners,	)	En Banc
v.	)	Filed Mar. 30 1989
BETTY BUTLER, and THE DAILY WORLD, a corporation,	)	
Respondents.	)	

DURHAM, J. – The plaintiffs in this case brought a defamation action against a newspaper and one of its reporters. The trial court dismissed the plaintiffs' cause of action by summary judgment. The Court of Appeals affirmed, holding that the plaintiffs had failed to make a prima facie showing of the defendants' fault. We affirm.[1]

On July 2, 1972, an altercation took place between Lorraine LaMon and John Peterson, a summer intern reporter for the Daily World. Both Lorraine LaMon and her husband, Edward, were charged with assault. Edward LaMon's count was dismissed at trial, but Lorraine LaMon was convicted in the Westport Municipal Court.

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[1] This court originally issued an opinion which affirmed the lower court decisions. *LaMon v. Butler*, 110 Wn.2d 216, 751 P.2d 842 (1988). We granted the LaMons' motion for reconsideration and the case was re-argued. Today's opinion supersedes our earlier opinion, although the analysis remains largely unchanged.

Lorraine LaMon appealed to the Grays Harbor County Superior Court. That appeal was dismissed by stipulation of the parties on November 10, 1972. The order of dismissal reads as follows: "It is ordered that the above action be dismissed with prejudice. It is further ordered, adjudged and decreed that the defendants pay all costs in the matter." A copy of this order is attached as appendix A.

At that time, Betty Butler was responsible for reporting news in the Westport area for The Daily World, a newspaper of general circulation in Grays Harbor County. Butler learned of the Superior Court's dismissal of Lorraine LaMon's appeal by calling the county clerk's office. A clerk read the order to Butler over the telephone. Butler's understanding of the order was that it "was not the type of dismissal that negated the judgment." Butler also discussed the effect of that order with the Westport City Attorney involved in Lorraine LaMon's appeal. According to Butler's deposition, the city attorney in large part confirmed her interpretation. Butler indicated that the city attorney told her that the dismissal in Superior Court "had very little to do with the [Municipal Court] verdict per se".

The assault incident described above provided, in part, the basis of a lawsuit filed in 1974 by the LaMons against Peterson and the Westport Chief of Police, John Regan. The LaMons alleged that Peterson executed a false complaint and that Regan falsely caused them to be arrested. They also alleged that Regan violated their civil rights by failing to provide equal police protection to them over a number of years. The LaMons later dismissed Peterson from the case. They eventually recovered

a $27,500 judgment against Regan on the civil rights claim in 1978. The judgment was affirmed on appeal in 1980.

Regan was not covered by Westport's liability insurance due to a temporary lapse in the policy's coverage. At a meeting of the Westport City Council on September 24, 1979, several citizens proposed that the City help Regan post a bond and pay his legal costs. Butler attended this meeting and wrote an article about it the next day. In that article, she included as background material the fact that Lorraine LaMon had been convicted of assault in Municipal Court, but she did not mention the Superior Court dismissal or its effect on the Municipal Court conviction. Butler made similar statements in other articles that she wrote between 1974 and 1980 concerning this litigation.[2]

The LaMons filed a complaint for defamation against Butler and The Daily World in Grays Harbor County Superior Court on September 24, 1981. The LaMons alleged that Butler's articles were defamatory by implying that Lorraine LaMon remained convicted of assault. They also attempted, unsuccessfully, to disqualify the county's two Superior Court judges by filing separate affidavits of prejudice. The trial court entered a summary judgment in favor of the defendant on December 22, 1983,

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[2] The parties have focused their attention primarily on the September 1979 article. The other articles written in whole or part by Butler were dated July 10, 1974, August 13, 1974, September 15, 1975, October 20, 1978, September 11, 1979, and April 17, 1980. Because the first five articles were published more than 2 years before the LaMons filed their complaint, the statute of limitations bars any action on them. *See* RCW 4.16.100(1). The April 1980 article contains the same misstatement that appeared in the September 1979 article.

dismissing the LaMons' cause of action. The Court of Appeals affirmed the dismissal, holding that the LaMons had failed to make a sufficient prima facie showing of the defendants' fault.[3] *LaMon v. Butler*, 44 Wn. App. 654, 722 P.2d 1373 (1986). We granted the LaMons' petition for review.

SUMMARY JUDGMENT

When a defendant in a defamation action moves for summary judgment, the plaintiff has the burden of establishing a prima facie case on all four elements of defamation: falsity, an unprivileged communication, fault, and damages. *See Guntheroth v. Rodaway*, 107 Wn.2d 170, 175, 727 P.2d 982 (1986); *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982). The prima facie case must consist of specific, material facts, rather than conclusory statements, that would allow a jury to find that each element of defamation exists. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); *Guntheroth*, at 175. The nonmoving party is entitled to have the evidence viewed in a light most favorable to him and against the moving party. *Herron*, at 170.

It is well settled that the standard of fault in defamation cases depends on the nature of the plaintiff. If the

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[3] The Court of Appeals also concluded that the LaMons had succeeded in proving other elements of defamation by clear and convincing evidence, namely, falsity, defamatory meaning, and unprivileged communication. Because we hold that there was no triable issue as to the defendants' fault, we need not address the Court of Appeals' discussion of the other elements.

plaintiff is a public figure or public official, he must show actual malice. If, on the other hand, the plaintiff is a private figure, he need show only negligence. *Bender v. Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). Not surprisingly, the LaMons characterize themselves as private figures, while The Daily world argues that they are public figures.

A second issue has been raised concerning the appropriate standard of proof by which fault must be shown. Citing *Dunlap v. Wayne*, 105 Wn.2d 529, 533-35, 716 P.2d 842 (1986), the Court of Appeals concluded that the LaMons had to prove their case by clear and convincing evidence because Butler and The Daily World were media defendants. *LaMon*, 44 Wn. App. at 657-58. The LaMons claim that providing greater protection to media defendants in this manner violates the First Amendment. They contend that they should only be required to show fault by a preponderance of the evidence. The Daily World has not expressed any position on this issue. An amicus group, the Allied Daily Newspapers, proposes that instead of focusing on a media/nonmedia distinction, this court should apply the higher standard of proof to issues of public concern and the lower standard to issues of private concern.

Resolution of this case, however, does not require us to address either of these questions. Even if the LaMons were entitled to the more lenient standards of proof and fault, they would still have the burden at summary judgment of showing by a preponderance of the evidence that Butler and The Daily World acted negligently. This they have failed to do.

The only evidence the LaMons have submitted to show the defendants' negligence is Lorraine LaMon's affidavit, in which she concludes that Butler knew that the statements were false because the order of dismissal was read to her over the telephone. Lorraine LaMon implies that Butler should be charged with knowledge of the order's contents, and we agree. However, the order of dismissal does not on its face give any indication of its effect on the Municipal Court conviction, and it can be read in two ways. It could be interpreted to mean that the entire prosecution is dismissed, thereby negating the Municipal Court conviction. Alternatively, the order can be interpreted to mean that only the appeal in Superior Court is dismissed, leaving the lower conviction intact. That the defendants were ordered to pay costs only adds to the confusion. The most that can be said is that reading the order would put one on notice to inquire further. And that is precisely what Butler did. She discussed the order with the city attorney involved in the case. According to Butler's deposition, the city attorney told her that the Superior Court dismissal did not affect Lorraine LaMon's conviction.

These facts do not constitute a prima facie case of negligence, even when we draw all reasonable inferences from the evidence in favor of the LaMons. The LaMons did not present any evidentiary material at summary judgment to controvert Butler's version of her conversation with the city attorney.[4] Thus, those facts are accepted

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[4] In their motion for reconsideration to this court, the LaMons for the first time submitted an affidavit from the city

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as true. *See Washington Osteopathic Med. Ass'n v. King Cy. Med. Serv. Corp.*, 78 Wn.2d 577, 579, 478 P.2d 228 (1970); *see also Zurita v. Virgin Islands Daily News*, 578 F. Supp. 306, 309 (D. V.I. 1984); *Hideout Records & Distribs. v. El Jay Dee, Inc.*, 601 F. Supp. 1048, 1053 (D. Del. 1984) (and cases cited therein). This principle takes on added weight in the context of defamation cases, where the plaintiff has the burden of making a prima facie case.

A reasonable trier of fact in this case could reach but one conclusion from the evidence: the defendants did not act negligently. Accordingly, the LaMons did not present a prima facie case on the issue of fault, and summary judgment was properly entered against them.[5]

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attorney disputing Butler's account of their conversation. Because this was not presented to nor considered by the trial court on summary judgment, we cannot consider it now on appeal. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 390, 715 P.2d 1133 (1986). Additionally, we deny the LaMons' motion to supplement the record with this evidence pursuant to RAP 9.11, there being no excuse for their failure to present the evidence to the trial court below. *See* RAP 9.11(a)(3) and the discussion below in the section entitled, "Scope of Issues on Appeal".

[5] The LaMons argue that this conclusion violates their constitutional right to a jury trial. Const. art. 1, § 21. We are well aware that summary judgment decisions should not involve the resolution of factual issues. Such is the province of the factfinder at trial. Yet, Washington courts have held many times that summary judgment should be granted when reasonable persons, giving all reasonable inferences to the nonmoving party, could only conclude that the moving party is entitled

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SCOPE OF ISSUES ON APPEAL

The LaMons have argued that it would be unfair for their case on appeal to be decided on the issue of fault. They contend that they did not have notice that the summary judgment hearing would include the issue of fault, because neither the trial judge nor the defendants addressed it below. They conclude that it would be unfair for this court to decide the appeal on the fault issue when it was not argued below.

We find this argument to be without merit. First, the LaMons were furnished with notice that they had to present a prima facie case on the issue of fault in order to survive the defendants' summary judgment motion. The defendants' memorandum in support of summary judgment quoted the following language from *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982):

> Under our cases, a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages. To make out a prima facie case for purposes of avoiding a summary judgment in favor of respondents, Mark would have

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to judgment. In such cases, there is no genuine issue of material fact. *See, e.g., Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). When there is no genuine issue of material fact, as in the instant case, summary judgment proceedings do not infringe upon a litigant's constitutional right to a jury trial. *See Nave v. Seattle*, 68 Wn.2d 721, 725, 415 P.2d 93 (1966), *appeal dismissed*, 385 U.S. 450 (1967); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974).

> to allege as to each element facts which would raise a genuine issue of fact for the jury.

(Citations omitted.) By reading this memorandum, the LaMons received notice that if they did not present evidence on the issue of fault, they ran the risk of summary judgment being entered against them.

Second, an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). The pleadings establish a defamation cause of action, an essential element of which is the defendants' fault. Therefore, dismissal for a failure to satisfy the burden of proving fault is based on a theory established by the pleadings. Furthermore, this theory is supported by proof in the record, most notably Butler's deposition, which was uncontroverted by the LaMons.[6] We conclude that the fault issue is properly before us.

AFFIDAVITS OF PREJUDICE

The final issue in this case concerns affidavits of prejudice. Affidavits of prejudice are the means by which litigants in this state can prevent a judge who they perceive to be biased from hearing their case. Affidavits of prejudice are governed by RCW 4.12.040 and 4.12.050, which provide in relevant part:

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[6] We not also that the LaMons argued the issue of fault in their briefs, both at summary judgment and in the Court of Appeals.

> No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. . . .

RCW 4.12.040.

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge . . .

RCW 4.12.050.

We have summarized the effect of these states as follows:

> Under these statutes and under our decisions a party litigant is entitled, as a matter of right, to a change of judges upon the timely filing of a motion and affidavit of prejudice against a judge about to hear his cause or any substantial portion thereof on the merits. Such a motion and affidavit seasonably filed presents no question of fact or discretion. Prejudice is deemed to be established by the affidavit and the judge to whom it is directed is divested of authority to proceed further into the merits of the action.

State v. Dixon, 74 Wn.2d 700, 702, 446 P.2d 329 (1968).

However, the right to file affidavits of prejudice is not unlimited: "[N]o party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040." RCW 4.12.050.

In this case, Lorraine LaMon filed an affidavit of prejudice against Judge Kirkwood and Edward LaMon filed an affidavit of prejudice against Judge Schumacher.[7] The LaMons argue that because they are each parties, they each have independent rights to file affidavits of prejudice under RCW 4.12.050.

Analysis of this issue resolves around the interpretation of "party" in RCW 4.12.050. Are co-plaintiffs each parties to an action, or instead, do they together constitute one party? This is apparently an issue of first impression in this state. The term "party" is not defined in RCW 4.12.050. However, one of the definitions of "party" in Black's Law Dictionary reads as follows:

> "Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, *the party plaintiff or defendant, whether composed of one or more individuals* and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.

(Italics ours.) Black's Law Dictionary 1010 (5th ed. 1979).[8] Under this definition, the LaMons together would constitute a single party.

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[7] The record does not disclose the disposition of the affidavit filed against Judge Schumacher. Since Judge Kirkwood ultimately ruled on the case, he evidently refused to recuse himself.

[8] Black's Law Dictionary also provides a less restrictive definition of "party", which reads:

(Continued on following page)

This same result has been reached by the Oregon Supreme Court when interpreting a statute similar to ours. The Oregon statute provided that "no party or attorney shall be permitted to make more than two applications in any action or proceeding under this act." *U'Ren v. Bagley*, 118 Or. 77, 85, 245 P. 1074, 46 A.L.R. 1173 (1926) (quoting Section 45-3, Oregon Laws). The Oregon Supreme Court interpreted the term "party" in this statute in the following manner:

> "Party" means either plaintiff or defendant, and includes all persons belonging to the particular class: 40 Cyc[lopedia of Law and Procedure] 146 [(1912)]. "Party" is used in a collective sense and if there be a plurality of plaintiffs, they are all only one party litigant.

U'Ren, at 85. *See also* 46 Am. Jur. 2d *Judges* § 212 (1969).

We find this holding to be persuasive. If we were to hold that each plaintiff and each defendant were entitled to file an affidavit of prejudice, then scores of judges could be disqualified in a single case. The Legislature could not have intended that result. Statutes must be

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(Continued from previous page)

> "A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A 'party' to an action is a person whose name is designated on record as plaintiff or defendant. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment."

(Citation omitted.) Black's Law Dictionary, at 1010. As we explain later in this opinion, we decline to use such an expansive definition of "party" in construing RCW 4.12.050.

interpreted so as to avoid absurd results. *General Tel. Co. of the Northwest, Inc. v. Utilities & Transp. Comm'n*, 104 Wn.2d 460, 471, 706 P.2d 625 (1985). Therefore, we hold that the language of RCW 4.12.050 limits co-plaintiffs or co-defendants to the filing of a single affidavit. The LaMons were only entitled to file a single affidavit of prejudice.[9]

The trial court's decision is affirmed.

/s/ Durham, J.

WE CONCUR:

/s/ Smith, J.
/s/ Andersen, J.
/s/ Callow, C.J.

/s/ Brachtenbach, J.

/s/ Dolliver, J.

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[9] The LaMons argue that even if they were entitled to file only one affidavit of prejudice, then Judge Kirkwood should have disqualified himself upon receiving Lorraine LaMon's affidavit of prejudice. The premise underlying this argument is that Judges Schumacher and Kirkwood should have given priority to Lorraine LaMon's affidavit of prejudice, presumably because the cause of action was more hers than Edward's. However, there was no reason for the judges to do so. Both of the LaMons were named as plaintiffs in the case; therefore, either one had the right to file the single affidavit to which they were jointly entitled. Because they each had this right, the judges had no way of knowing which affidavit was controlling. There is no evidence in the record to show that the LaMons indicated that one affidavit had priority over the other. Accordingly, we cannot conclude that Judge Kirkwood erred in hearing this case.

APPENDIX A
Supreme Court For Grays Harbor County

CITY OF WESTPORT, Plaintiff,	)	No. 62480
	)	**Order on Motion**
vs.	)	
EDWARD G. LAMON and LORRAINE LAMON, husband and wife, Defendants.	)	

(Filed Nov. 10, 1972)

This cause coming on for hearing on motion of the defendants by and through their attorney of record. Arthur L. Davies, of Owens, Johnson and Weaver Attorneys at Law, to dismiss the action and the same being stipulated by counsel, Arthur L. Davies for defendants and William E. Morgan for plaintiff, and the Court being fully advised in the premises, it is ordered that the said motion be and the same is hereby granted. It is ordered that the above action be dismissed with prejudice. It is further ordered, adjudged and decreed that the defendants pay all costs in the matter to which ruling the Court excepts and his exception is allowed.

Done in open Court this 10 day of November, 1972.

/s/ Kirkwood, Judge

PRESENTED BY: _____

APPROVED FOR ENTRY

BY: Arthur L. Davies
Attorney for Plaintiff

Lamon v. Butler
Majority by Durham, J.
Dissent by Utter, J.

No. 53196-0

UTTER, J. (dissenting) – I dissent on two grounds. First, this court should unequivocally reject the distinction between media/nonmedia defendants in determining the applicable standard of proof in libel cases. The majority, by citing the opinion of the Court of Appeals, implies that the standard of proof depends upon the status of the defendant: "clear and convincing evidence" against a media defendant and "preponderance of the evidence" against a nonmedia defendant. Majority, at 5. To perpetuate this distinction, even while stating that it would not make any difference in deciding this case, majority at 5, only lends confusion to an area of law that desperately needs greater clarity.

Second, I believe that the LaMons have presented sufficient evidence of fault to overcome defendant's motion for summary judgment.

I

In affirming the trial court's decision to grant defendants' motion for summary judgment, the Court of Appeals held that "[a] defamation plaintiff resisting a *media* defendant's motion for summary judgment must establish a prima facie case by evidence of *convincing clarity.*" (Some italics mine.) *LaMon v. Butler*, 44 Wn. App. 654, 657, 722 P.2d 1373 (1986). While noting correctly that this standard of proof was not required by the United States Supreme Court, the Court of Appeals reasoned

from recent opinions of this court that media defendants have greater protection than ordinary citizens similarly engaged in the exercise of First Amendment rights. *LaMon*, at 657 (citing *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986)). Such a conclusion is not warranted and should be corrected.

There are three problems with the media/nonmedia distinction in our current approach to standard of proof issues in libel law. Each of them strongly suggests that the distinction should be dropped.

1. *Sullivan Standards Misconstrued*

First, to the extent that the heightened standard of proof came to be applied as a result of state court interpretations of United States Supreme Court decisions, those decisions have been misconstrued. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), the Court held that in defamation cases where the plaintiff is a public official, a prima facie case must be established with evidence of "convincing clarity", including a showing of actual malice. *Sullivan*, at 285-86. This twin standard of actual malice and convincing clarity was later extended to cases where the plaintiff is a "public figure". *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967). We adopted these standards of fault and proof for public figure plaintiffs in *Grayson v. Curtis Pub'g Co.*, 72 Wn.2d 999, 436 P.2d 756 (1967). While only the plurality of the United States Supreme Court would have extended this twin standard to comments about private individuals which pertained

to matters of "general public interest", *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971), this state nonetheless adopted the *Sullivan* standard for such comments because it felt constitutionally bound to follow the *Rosenbloom* plurality. *Miller v. Argus Pub'g Co.*, 79 Wn.2d 816, 490 P.2d 101 (1971).

However, in reconsidering the issue 3 years later, the United States Supreme Court held that the *Sullivan* standards were not constitutionally mandated when the plaintiff was a private individual; hence, the states were free to provided greater protection to defamed private individuals than to public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). Once again following the cue from the United States Supreme Court, Washington modified the standard for private person plaintiffs in defamation actions against the media. In *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), this court overruled *Miller*. We stated that the *Sullivan* standard of liability "imposes a totally unacceptable burden" when applied to private plaintiffs and that, henceforth, such plaintiffs need only show ordinary negligence. *Taskett*, at 444.

Taskett only expressly addressed one aspect of the *Sullivan* twin standard, that of fault. The substantive evidentiary standard to be applied was left unstated. However, the logic which compelled us to adopt a lesser standard of liability for actions by private plaintiffs strongly suggests that the standard of proof should likewise be lower. To have the nature of the plaintiff determine the standard of liability but have the status of the defendant determine the standard of proof is confusing

and inconsistent. Yet this is where our case law currently stands.

The higher standard of convincing clarity has occasionally been applied by state courts to suits by private persons even though the case authority applying this standard involved public officials or public figures. The first case applying this standard to a private individual was *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945 (1979). There the court stated that a plaintiff must present evidence "of a sufficient quantum to establish a prima facie case with convincing clarity." *Sims*, at 237. While following *Taskett* insofar as the standard of fault to be applied, the court applied the *Sullivan* standard of proof, even though Sims was a private citizen and traditionally entitled to greater protection of his reputation than a public figure. To support its application of the convincing clarity standard rather than that of simple preponderance, the court cited two Washington cases – *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973) and *Exner v. AMA*, 12 Wn. App. 215, 529 P.2d 863 (1974). However, both of these cases involved plaintiffs who were public figures for whom the application of the *Sullivan* standards of fault and proof was constitutionally compelled.

The application of this heightened evidentiary standard was challenged by the private plaintiff in *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982), but the argument was rejected by this court. We stated then that for "policy reasons, rooted in the First Amendment . . . an early testing of plaintiff's evidence by a convincing clarity

burden continue to be persuasive." *Mark*, at 487. *Chase* was again cited as the source for this rule.

The last case in this evolution was *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986). There the court noted for the first time that the cases applying the "convincing clarity" standard had involved media defendants (although it is equally accurate to say that those cases, with the exception of *Sims* and *Mark*, involved plaintiffs who were either public officials or public figures) and that "First Amendment concerns at that time supported the special protection that we extended . . . " *Dunlap*, at 534. The Court suggested that the same First Amendment concerns were not implicated when a nonmedia defendant was being sued for a statement about private affairs; thus, whenever a nonmedia defendant was involved "the usual rules governing summary judgment should control", presumably including a simple preponderance of the evidence standard. *Dunlap*, at 535. This media/nonmedia defendant distinction in defamation actions was reiterated without comment in *Guntheroth v. Rodaway*, 107 Wn.2d 170, 176, 727 P.2d 982 (1986) and is repeated in the majority opinion in the current case.

Thus, the convincing clarity standard of proof came to be applied in libel suits against media defendants as a result of mistaken interpretations of United States Supreme Court decisions.

2. *Current Distinction Is Contrary to the First Amendment*

Second, the media/nonmedia defendant distinction in defamation actions by private individuals is, as the

LaMons argue, contrary to the First Amendment. Since this court's media defendant distinction currently rests upon "policy reasons, rooted in the First Amendment", *Mark*, at 487, it is important to consider that a clear majority of the Justices on the United States Supreme Court and several federal courts addressing the issue have stated that the First Amendment does *not* support granting the media special protection beyond that available to individual citizens. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985), five Justices signed separate opinions explicitly concluding that the First Amendment requires the equal treatment of media and nonmedia defendants and a sixth, Chief Justice Burger, agreed with this conclusion. Justice White was emphatic in opposing any media/nonmedia distinction in defamation law.

> None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn. It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers . . . with the most misinformation and do the most damage to private reputation.

(Footnote omitted.) *Dun & Bradstreet*, at 773 (White, J. concurring).

In a dissenting opinion joined by three other members of the Court, Justice Brennan stated categorically that a media/nonmedia distinction in defamation law is

> irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . "

Dun & Bradstreet, at 781, quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). Justice Brennan further emphasized the problems in defining "media" and suggested that any definition would soon become obsolete. Thus, he concludes that in the context of defamation law,

> the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.

Dun & Bradstreet, at 784.

A clear majority of the United States Supreme Court unequivocally reject any media/nonmedia distinction in libel law. This conclusion has since been strongly supported by two federal appellate courts. *Garcia v. Board of Educ.*, 777 F.2d 1403, 1409-11 (10th Cir. 1985); *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632, 642 (8th Cir. 1986). The message is now loud and clear: distinguishing between media and nonmedia defendants in libel cases is contrary to the First Amendment. We should not continue to hold otherwise.

3. *Washington Constitution*

Third, even assuming that the states can give greater protection to media as opposed to nonmedia defendants without violating either the First or Fourteenth Amendments, it has not been determined whether the Washington Constitution does in fact provide for such a distinction. In *Dunlap*, this court noted that "the Washington Constitution may provide heightened protection to media defendants". *Dunlap*, at 534 n.1 (citing article 1, section 5 and *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353

(1984)). In the present case, this issue was not raised before the Court of Appeals. But that court nonetheless concluded from its evaluation of Washington case law and the footnote in *Dunlap* that the Washington Constitution "*does* provide heightened protection to media defendants". (Italics mine.) *LaMon*, at 657, n.2.

Such a definitive statement by the Court of Appeals is unwarranted. First, the language of article 1, section 5 is hardly unambiguous on this point. There is no differentiation between freedom of speech and press and, hence, no clear grounds for distinguishing levels of protection for comments from media and nonmedia sources. Second, the footnote cited in *Dunlap* goes only so far as to suggest that article 1, section 5 *may* provide heightened protection to the media in defamation cases. However, it was only a suggestion, was not essential to the holding in the case, and, most importantly, has never been raised in arguments before this court. Third, the special protection provided by the "convincing clarity" evidentiary standard has not been sought by the media defendants in this case as a state constitutional right; it is the petitioners who raise the issue on appeal claiming that the state constitution affords no such enhanced protection. To allow the language of the Court of Appeals to stand granting state constitutional protection to the media which is not granted to individual citizens of the state is highly unsatisfactory. The media defendant has not urged its adoption and this court has not been presented with any arguments using the nonexclusive criteria of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), or other reasons mandating heightened state constitutional protection.

The media/nonmedia defendant distinction in our defamation law should be dropped. The appropriate evidentiary standard should be governed solely by the nature of the plaintiff, in the same manner that we determine which standard of liability to apply. A public figure plaintiff would therefore need to prove actual malice by clear and convincing evidence and a private person would only need to show negligence by simple preponderance of the evidence. The status of the defendant is irrelevant.

It is altogether proper to make the nature of the plaintiff the determining factor. The two basic rationales for the strict *Sullivan* standards are the need to promote vigorous and robust debate on matters and personalities affecting public policy and the ability of public figures to use the media to rebut false statements made about them. However, neither of these rationales is implicated when a libel suit is brought by a private person.

Abolishing the media/nonmedia distinction would be consistent with recent decisions of the United States Supreme Court and federal courts of appeals which have clarified the standards since our earlier cases. It would also be consistent with this court's reasoning in *Taskett* where it adopted "ordinary negligence" as the standard of fault for defamation cases involving a private person suing a media defendant.

The distinction between media and nonmedia defendants is faulty and should no longer be employed. I believe that "the best way forward is to take two steps back" and correct our mistake. The proper standard of proof in any libel action should depend solely on the

nature of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Otherwise we perpetuate a body of law under which two defendants engaged in the same conduct may suffer vastly different penalties simply because one is a member of the media and the other is not.

II

The Court of Appeals determined, and the majority does not disagree, that the LaMons are private persons for purposes of this litigation. Thus, they would be entitled to recover if they can show by a preponderance of the evidence that the statements made about them were false, had a defamatory meaning, were made negligently by the defendant, and were not otherwise privileged communication. *See Guntheroth*, at 175; *Dunlap*, at 542. As the nonmoving party in a summary judgment proceeding, the LaMons are further entitled to have the evidence and all reasonable inferences construed in the light most favorable to them and against the defendants. *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987). Applying the appropriate evidentiary standard, I believe that the LaMons have presented a prima facie case and are entitled to proceed to trial.

The Court of Appeals concluded that the LaMons had provided sufficient evidence to show all the elements of defamation except defendants' fault. That court ruled that the LaMons had not made a prima facie showing of negligence and upheld summary judgment for the defendants. On this basis alone the majority affirms the decision.

The issue before us is whether there is sufficient evidence from which a trier of fact could reasonably conclude that defendants Butler and The Daily World *"knew or, in the exercise of reasonable care, should have known"* that the statements made about the LaMons were false. *Taskett*, at 445. While the majority, like the Court of Appeals, examines only the statements made regarding the assault conviction, the LaMons' cause of action actually rests upon three allegedly defamatory statements. In addition to the false statements regarding the convictions, Butler and The Daily World are alleged to have made false statements to the effect that the LaMons' civil rights litigation against the police chief was dismissed in federal court for being "frivolous" when in fact there was a substantial recovery, and to the effect that the civil rights suit was "connected" with the alleged assault incident when, in fact, there was no connection whatsoever.

These statements were made not once, but over the course of several years. Butler continued to make these statements even *after* the LaMons had notified her and The Daily World of their falsity. Although the statute of limitations limits the LaMons' suit to those statements published in September 1979 and April 1980, the record contains several other articles published before then containing the same defamatory remarks. The false statements that were made shortly after the reversal of LaMon's assault conviction may well have been the result of honest mistake. The LaMons are nonetheless entitled to argue that it is at least negligent and perhaps reflects actual malice when the defendant reporter and newspaper persist in printing the same mistaken and defamatory comments for 7 years.

The strongest basis for the LaMons' action lies in the false reporting of an assault conviction in municipal court that was later reversed by dismissal in superior court. Butler says that after she heard of the superior court order dismissing the action against the LaMons, she did not know its effect on the municipal court conviction. However, Butler did not take the time to read the order herself. Butler Deposition, at 13. Had she done so, she would have noted that the superior court judge ordered that the "above action be dismissed with prejudice"; and that the "above action" clearly referred to the City of Westport's assault charges against the LaMons, not merely the appeal of the municipal court conviction. Clerk's Papers, at 66.

Although our law has since changed, the rule had been well established at the time the order was issued that dismissal of a superior court action voids a prior municipal conviction. *See State v. Buckman*, 51 Wn.2d 827, 322 P.2d 881 (1958). The majority's characterization of the superior court order as a "dismissal of Lorraine LaMon's appeal" is inexplicable when the language of the order is given its plain and simple meaning. Majority, at 2.

Butler asserts that she contacted the Westport city attorney regarding the implications of the dismissal. According to her unsupported recollection of the conversation, the city attorney told her that the original municipal court conviction still stood despite the superior court's dismissal of the case. Butler Deposition, at 13-14. The majority is correct in stating that the LaMons offer no direct evidence that this conversation did not take place or that the city attorney said something other than what Butler now recalls. However, the LaMons have submitted

evidence that it was the city attorney himself who initially proposed the order dismissing the case against them. Clerk's Papers, at 63. It is at least arguable that the same city attorney who proposed dismissing the case against the LaMons in the first place would not later tell a reporter that the assault conviction was not affected. This evidence and the reasonable inference from it presents a genuine issue of material fact sufficient to overcome the defendants' motion for summary judgment. For this reason we cannot accept Butler's version of events at face value.

The two other false statements made by the defendants in the publications at issue here further suggest that the LaMons have an adequate factual basis for their complaint. Butler continued to write that the LaMons' civil rights action against the police chief was dismissed as being "frivolous", despite knowing that in fact the LaMons were successful in their suit in federal district court. In this instance, Butler cannot claim to have been unaware of the true facts of the case. The LaMons had earlier paid for several large advertisements, published in the same newspaper, reprinting verbatim the findings of fact and judgment of the federal district court granting them relief and the memorandum opinion of the Ninth Circuit Court of Appeals affirming the judgment. Clerk's Papers, at 41. Butler admitted in her deposition that she knew of the advertisements. Butler Deposition, at 35. In addition, Butler falsely reported that the civil rights action "stemmed from" and was "connected with" the assault conviction. She later admitted in deposition that she knew that the basis for the LaMons' suit against the police chief was a denial of equal protection and had

nothing to do with the prior municipal court conviction. Butler Deposition, at 27-28.

It is difficult to reconcile these facts with the majority's conclusion that no trier of fact could reasonably find the defendants at fault. The LaMons clearly have sufficient evidence with which to proceed to trial. The Court of Appeals decision should be reversed and the case remanded for trial.

I concur, Dore, J.
I concur, Pearson, J.

APPENDIX C

IN THE COURT OF APPEALS,
STATE OF WASHINGTON, DIVISION II

EDWARD LaMON and LORRAINE LaMON, husband and wife,	)	
Petitioners	)	No. 7520-2-II
v.	)	Filed July 31, 1986
BETTY BUTLER and THE DAILY WORLD, a corporation,	)	
Respondents	)	

REED, J. – Edward and Lorraine LaMon appeal the summary judgment dismissing their defamation action against The Daily World and its employee, Betty Butler. We affirm.

The LaMons filed an action for defamation on September 24, 1981, based upon the publication of an article on September 25, 1979, by The Daily World, a newspaper of general circulation in Grays Harbor County. The article discussed a Westport city council meeting during which a number of Westport citizens explored the possibility of community fund-raising to provide a bond to cover a judgment obtained by the LaMons against Westport police chief John Regan. As background information, the article stated that "[t]he original lawsuit filed by the LaMons stemmed from a 1972 incident that resulted in a

municipal court assault conviction of Mrs. LaMon." The "original lawsuit" referred to in this article was a federal court action against the police chief and against John Peterson, the complaining witness in an assault prosecution against the LaMons. The federal suit alleged false arrest, malicious prosecution, and a denial of equal protection arising from the chief's failure to provide adequate police protection for the LaMons' business.[1] An earlier suit in superior court for false arrest and malicious prosecution against the same defendants was dismissed, and the dismissal was affirmed on appeal. The claims of false arrest and malicious prosecution derived from an incident at a restaurant then owned by the LaMons which resulted in the assault charges being filed against the LaMons. The Municipal Court dismissed the case against Mr. LaMon and found Mrs. LaMon guilty of misdemeanor assault. Mrs. LaMon appealed that judgment and, on appeal, the Superior Court dismissed the case with prejudice. The record before this court does not reveal the basis for the dismissal, except that it was by stipulation of the parties.

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[1] After a dismissal of the LaMons' suit by the Federal District Court and a reversal and remand by the Ninth Circuit, the Federal District Court found that the police chief had denied the LaMons equal police protection and awarded them $25,000 in damages and $2,500 in attorney's fees. According to the September 25 article, the "original lawsuit" had been filed "on a single day when the city's liability insurance coverage for Regan had lapsed on one policy and had not been picked up on another. Thus, the city has paid Regan's attorney costs in the numerous appeals of the case since 1974." At the time the article was published, Regan was appealing the judgment to the Ninth Circuit.

In their complaint for defamation, the LaMons alleged that The Daily World and Betty Butler, the author of the article, had defamed Mrs. LaMon by stating falsely that she had been convicted of assault in municipal court in 1972. The article made no reference to the fact that her assault conviction had been dismissed on appeal. In her affidavit, Mrs. LaMon states that Butler had the superior court order read to her over the telephone and that therefore she knew that the assault action had been dismissed with prejudice. Butler, however, states in her deposition that, although she knew the contents of the order of dismissal, she did not understand that the effect of the the order was to void the conviction.

On December 1, 1983, Mr. LaMon filed an affidavit of prejudice against Judge Schumacher and Mrs. LaMon filed an affidavit of prejudice against Judge Kirkwood. Judge Schumacher and Judge Kirkwood were then the only superior court judges in Grays Harbor County. Judge Kirkwood did not disqualify himself. On that same day he issued his memorandum decision granting the defendants' motion for summary judgment.

[1] A defamation plaintiff must show four essential elements: a defamatory and false statement, an unprivileged communication, fault, and damages. *Bender v. Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983); *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 233, 580 P.2d 642, *review denied*, 91 Wn.2d 1007 (1978), *cert. denied*, 441 U.S. 945, 60 L.Ed. 2d 1047, 99 S. Ct. 2164 (1979); Restatement (Second) of Torts § 558 (1977). A defamation plaintiff resisting a *media* defendant's motion for summary judgment must establish a prima facie case by evidence of convincing

clarity.[2] *See Dunlap v. Wayne*, 105 Wn.2d 529, 533-35, 716 P.2d 842 (1986); *Mark v. Seattle Times*, 96 Wn.2d 473, 486-87, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 73 L. Ed. 2d 1339, 102 S. Ct. 2942 (1982).

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[2] In *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986), the court noted Justice Rehnquist's suggestion in *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 813, 104 S. Ct. 1482 (1984) that the Court recognizes no special rules protecting defamation defendants in summary judgment actions. The court also noted that the Supreme Court was currently considering this very issue in *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), but stated that "[i]n any event, the Washington constitution may provide heightened protection to media defendants. Const. art. 1, § 5; *see State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984)." *Dunlap v. Wayne*, 105 Wn.2d at 534 n.1.

The United States Supreme Court recently handed down its decision in *Anderson v. Liberty Lobby, Inc., supra*, in which it held that the evidentiary standard on summary judgment is governed by the substantive evidentiary standard that applies at trial in a particular case. In defamation actions, the substantive evidentiary standard is controlled by the classification of the plaintiff as either a private individual or as a public figure or official. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 St. Ct. 710, 95 A.L.R.2d 1412 (1964). Thus, because a public figure or official must, at trial, show actual malice by evidence of convincing clarity, the appropriate summary judgment standard is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2514.

The Washington Supreme Court, by apparently holding the summary judgment standard dependent upon the

(Continued on following page)

[2, 3] The initial question on summary judgment is whether the statement at issue is capable of a defamatory meaning. If the answer is in the affirmative, it is then the jury's function to determine whether the statement is in fact defamatory. *Miller v. Argus Pub'g Co.*, 79 Wn.2d 816, 820 n.3, 490 P.2d 101 (1971); *Amsbury v. Cowles Pub'g Co.*, 76 Wn.2d 733, 738, 458 P.2d 882 (1969). A statement is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). The imputation of a criminal offense traditionally has been categorized as defamatory per se. *See, e.g., Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 353, 670 P.2d 240 (1983); *Amsbury v. Cowles Pub'g Co.*, 76 Wn.2d at

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(Continued from previous page)

defendant's status as media or nonmedia – at least when the nonmedia defendant's alleged defamatory statement is about "private affairs" – differs from the United States Supreme Court's approach, which, in defamation actions, turns on the status of the plaintiff. *See Dunlap v. Wayne, supra; Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 73 L. Ed. 2d 1339, 102 S. Ct. 2942 (1982). Because of this difference in approach, this case presents a situation where we, guided by *Dunlap v. Wayne* and *Mark v. Seattle Times*, apply a stricter evidentiary burden on summary judgment than would the United States Supreme Court. We apply the convincing clarity standard because of the The Daily World's status as a media defendant. The United States Supreme Court would not require evidence of convincing clarity because the LaMons, as we determine *infra*, are private individuals. *Anderson v. Liberty Lobby, Inc., supra.* The necessary conclusion in this situation is then that the Washington Constitution does provide heightened protection to media defendants. *Dunlap v. Wayne, supra.*

737. Even if, as Butler and The Daily World assert, the reference to Mrs. LaMon's conviction could be considered, under the circumstances, innocuous, the reference is certainly capable of defamatory meaning. That is all this court need decide on this issue.

[4] Butler and The Daily World contend, however, that, even if defamatory, the statement that Mrs. LaMon was convicted of assault is true. Truth, of course, is a complete defense of a claim of defamation. *Jolly v. Fossum*, 59 Wn.2d 20, 24, 365 P.2d 780 (1961); *O'Brien v. Franich*, 19 Wn. App. 189, 194, 575 P.2d 258 (1978). As a general rule, the truth of an alleged defamatory statement must be measured "as of the time of the defamatory publication." Restatement (Second) of Torts § 581A, comment *g* (1977). Here the record establishes, first, that Mrs. LaMon was convicted of assault in municipal court and, second, that the conviction was, in effect, reversed on appeal to the superior court. Thus, although, as a matter of "historical fact", Mrs. LaMon was convicted of assault, as a matter of "legal fact", the conviction, having been reversed, was voided. *See State v. Hill*, 83 Wn.2d 558, 561, 520 P.2d 618 (1974); *State v. Dixon*, 17 Wn. App. 804, 806, 565 P.2d 1207, *review denied*, 89 Wn.2d 1012 (1977).

We find that the LaMons have made a sufficient showing of falsity and that Butler and The Daily World have not rebutted that showing. The falsity in this case lies not in what was said but in what was left unsaid. To find otherwise would yield harsh results for defamation plaintiffs. For example, a person who is arrested erroneously, based on mistaken identity, thereafter should not be subject to media reports citing his arrest while

ignoring his subsequent vindication. The test of truth cannot ignore the test of time.

With respect to the next element in the defamation equation, Butler and The Daily World contend that publication of the article containing the alleged defamation was privileged because it was a report of a public proceeding. In *Mark v. Seattle Times, supra,* the court approved the following statement of the rule regarding reports of public proceedings contained in the Restatement (Second) of Torts § 611 (1977):

> [t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Mark v. Seattle Times, 96 Wn.2d at 487.

The problem with the respondents' assertion of this privilege is that the statement regarding Mrs. LaMons's conviction did not derive from what took place at the city council meeting. As the respondents concede, the statement was merely background information. That statement was, thus, not within the scope of the privilege asserted.

The next issue we reach is that of fault. The degree of fault necessary to make out a prima facie case of defamation depends on whether the plaintiff is (1) a private individual or (2) a public figure or public official. *Bender v. Seattle,* 99 Wn.2d at 599. If the plaintiff is a private individual, a negligence standard applies. *Bender v. Seattle, supra.* If the plaintiff is a public official or public figure, the plaintiff must prove that the defendant acted

with "actual malice", that is, with a knowledge of falsity or with a reckless disregard of truth or falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, 95 A.L.R.2d 1412 (1964); *Bender v. Seattle, supra*. Butler and The Daily World argue that the LaMons are public figures and therefore must show actual malice.

The LaMons cannot be classified as public figures. We find it unnecessary, however, to elaborate upon this conclusion because we also conclude that, under the lesser standard of fault that a private plaintiff must show, the LaMons have not met their burden by evidence of convincing clarity. The LaMons base their argument, under either standard of fault, upon their contention that Butler and The Daily World knew the statement to be false because Butler knew the contents of the order dismissing the action against Mrs. LaMon.

[5] Under the negligence standard, a plaintiff may recover for a defamatory falsehood "on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect." (Italics omitted.) *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976).

We reject, first, the contention that Butler knew the statement to be false. Knowledge of the contents of the superior court order is not necessarily equivalent to a knowledge of the legal effect of that order. Butler admits in her deposition that the court clerk read the order to her over the telephone but Butler asserts that she understood

the order to mean that it "was not the type of dismissal that negated the judgment [of conviction]." The LaMons have presented no evidence that contradicts Butler's assertion.

We reject, next, any contention that the defendants, in the exercise of reasonable care, should have known the statement about the conviction was false. The superior court order of dismissal is not entirely clear as to its legal effect. That order states that "the above action [City of Westport v. LaMon] be dismissed with prejudice." The order goes on to require *the defendants* to pay all costs. The order says nothing about voiding or negating the judgment, although that is the legal effect of the order. Butler, a lay person, exercised reasonable care by contacting the city attorney, who confirmed her impression that the order did not negate the conviction. The LaMons did not present any evidence that the city attorney told Butler otherwise. The LaMons' evidence would not support a reasonable jury finding that they have shown negligence by clear and convincing evidence. Under the circumstances, Butler, as a matter of law, must be held to have acted reasonably and conscientiously before publishing. The fact that what she published was false does not mean she acted negligently. The media are not to be held strictly liable for their mistakes.

The last issue concerns the LaMons' contention that the trial judge erred in refusing to disqualify himself based upon Mrs. LaMon's affidavit of prejudice. The LaMons contend that the trial judge did not disqualify himself on the ground that a marital community is entitled to but one affidavit of prejudice.

This issue is one of first impression in this state. The controlling statute, RCW 4.12.050, states in pertinent part:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge . . . no party or attorney shall be permitted to make more than one such application in any action or proceeding . . .

Under the language of the statute, the resolution of this issue turns on whether Mr. and Mrs. LaMon are each, under the facts of this case, entitled to file an affidavit of prejudice because each is a "party."

In the only case we have found that has confronted this issue, *Romero v. Felter*, 83 N.M. 736, 497 P.2d 738 (1972), a husband and wife each claimed damages, in different amounts, from the publication of an alleged libelous letter that referred to both the husband and wife. The Supreme Court of New Mexico reasoned that, because the plaintiffs each had a separate cause of action that he or she could pursue against the defendant and because the plaintiffs asserted their separate causes of action, each plaintiff, husband and wife, was entitled to disqualify a trial judge under a statute similar in effect to RCW 4.12.050. *Romero v. Felter*, 497 P.2d at 740-41. Underlying the *Romero* decision was the recognition that marital status does not destroy the individual legal identities of the husband and wife. *Romero v. Felter*, 497 P.2d at 739-40.

[6] Washington courts have also recognized that the marital relationship does not destroy the separate legal

identities of the spouses. *Christie v. Maxwell*, 40 Wn. App. 40, 43, 696 P.2d 1256, *review denied*, 104 Wn.2d 1002 (1985); *see also Freehe v. Freehe*, 81 Wn.2d 183, 187, 500 P.2d 771 (1972). Following the reasoning in *Romero*, we conclude that recognition of separate identities should be extended to RCW 4.12.050 to allow a husband and wife each to file an affidavit of prejudice when each can be considered a "party" by virtue of a separate cause of action which that "party" has and actually asserts.

In the instant case, however, Mr. and Mrs. LaMon do not assert, nor do they possess, separate causes of action. The alleged defamation referred solely to Mrs. LaMon, and Mr. LaMon has no individual cause of action based upon its publication. It is only by being a part of the marital community that Mr. LaMon has joined in this action.

Consequently, the LaMons are entitled to one affidavit of prejudice under RCW 4.12.050 because they are but one "party" for purposes of this action. Because they exercised their right under this statute by applying for the disqualification of Judge Schumacher, Judge Kirkwood properly denied their application for his disqualification.

The trial court's order of summary judgment is affirmed.

WORSWICK, C.J., and ALEXANDER, J., concur.

Reconsideration denied September 4, 1986.

Review granted by Supreme Court October 28, 1986.

APPENDIX D

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

EDWARD LaMON and LORRAINE LaMON, husband and wife, Plaintiffs	No. 81-2-748-8
v.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING CAUSE WITH PREJUDICE AND JUDGMENT THEREON
BETTY BUTLER and THE DAILY WORLD, a corporation, Defendants	

THIS MATTER coming on this date before the undersigned judge of the above-entitled court on the motion of defendants for summary judgment; the court having previously considered affidavits and heard argument of counsel on defendants' motion; the court having considered the following items in ruling on motion for summary judgment:

(1) Deposition of Betty Butler;

(2) Deposition of Edward LaMon;

(3) Deposition of Lorraine LaMon;

(4) Complaint of plaintiff;

(5) Answer of defendants;

(6) Plaintiff's answers to interrogatories propounded by defendants;

(7) Defendants' motion for summary judgment with attachments filed October 12, 1983;

(8) Defendants' memorandum of authorities in support of motion for summary judgment;

(9) Defendants' affidavit in support of defendants' motion with attachments filed October 12, 1983;

(10) Additional information from published deposition with attachments filed October 20, 1983;

(11) Additional memorandum of authorities in support of summary judgment filed October 20, 1983;

(12) Motion to publish all depositions;

(13) Affidavit of Lorraine LaMon with attachments filed October 24, 1983;

(14) Motion for change of judge by Edward LaMon against Honorable John W. Schumacher filed December 1, 1983;

(15) Motion and affidavit for change of judge by Lorraine LaMon against John H. Kirkwood filed December 1, 1983;

(16) Affidavit of Larry Clevenger filed December 1, 1983;

(17) Affidavit of Edward LaMon filed October 24, 1983;

(18) Memorandum of authorities with attachments filed by Jack L. Burtch November 24, 1983; and

(19) Judge's memorandum decision filed December 1, 1983.

After having considered all of the above matters as well as argument of counsel, the court orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of plaintiffs Edward LaMon and Lorraine LaMon be and it hereby is dismissed with prejudice.

DATED this 22nd day of December, 1983.

(s)
JUDGE/COMMISSIONER

Presented by:

CHARETTE BROWN EDWARDS LEWIS
& JANHUNEN

By /s/
Robert E. Charette
Attorneys for Defendants

APPENDIX E

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

EDWARD LaMON and LORRAINE LaMON, husband and wife, Plaintiffs v. BETTY BUTLER and THE DAILY WORLD, a corporation, Defendants	NO. 81-2-748-8 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW defendants BETTY BUTLER and THE DAILY WORLD, through their attorneys, Charette Brown Edwards Lewis & Janhunen by Robert L. Charette, and move the court for summary judgment in their favor on the following issues:

1. That plaintiffs are barred by the statute of limitations from asserting any claim or presenting any evidence for damages for any action of the defendants occurring prior to September 24, 1979.
2. That the plaintiffs are "public figures."
3. That the newspaper article attached as Exhibit 1 hereto which appeared in The Daily World on September 25, 1979 is not defamatory of the plaintiffs.
4. That plaintiff, Lorraine LaMon, was convicted in Westport Municipal Court of assault.
5. That a judgment of dismissal be granted.

THIS MOTION is based upon the attached affidavit, exhibits, and records and files herein.

DATED October 11, 1983

CHARETTE BROWN EDWARDS
LEWIS & JANHUNEN
Attorneys for Defendants

by /s/ Robert L. Charette
Robert L. Charette

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

EDWARD LaMON and LORRAINE LaMON, husband and wife, Petitioners,	)	NO. 53196-0
v.	)	AFFIDAVIT OF WILLIAM MORGAN
BETTY BUTLER and THE DAILY WORLD, a corporation, Respondents.	)	

STATE OF WASHINGTON)
: ss.
GRAYS HARBOR COUNTY)

WILLIAM MORGAN, being first duly sworn on oath, deposes and says:

I have been city attorney for the City of Westport since January of 1972. I was city attorney when Lorraine LaMon was convicted in the Westport Municipal Court of simple assault. I was also the city attorney representing the City on her appeal to the Superior Court.

At no time did I ever advise Betty Butler, that the Superior Court dismissal did not affect Lorraine LaMon's conviction. When Betty Butler inquired of me regarding the affect of the order, I informed her of the conviction in the municipal court, that it had been appealed, and that the charges were dismissed on appeal.

/s/ William Morgan
WILLIAM MORGAN

Subscribed and sworn to before me this 23rd day of March, 1988.

/s/ Jack L. Burtch
NOTARY PUBLIC in and for the State of Washington, residing at Aberdeen.

My commission expires: 9/15/90

APPENDIX G

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

EDWARD LaMON and LORRAINE LaMON, husband and wife, Petitioners,	)	NO. 53196-0
v.	)	AFFIDAVIT OF WILLIAM (BILL) WADE JR.
BETTY BUTLER and THE DAILY WORLD, a corporation, Respondents.	)	

STATE OF WASHINGTON)
: ss.
GRAYS HARBOR COUNTY)

WILLIAM (BILL) WADE JR., being first duly sworn on oath deposes and says:

I was Mayor of Westport from 1974 - 1979. During that period of time Betty Butler was a reporter for The Daily World, a newspaper with offices in Aberdeen, would report our council meetings. We constantly had problems with her accurately reporting the council meetings and I and other councilmen had to complain on several different occasions. Despite our complaints, she continued to incorrectly report the council business. Her reporting was always slanted in favor of those people in the community that she personally favored and supported.

/s/ William Wade, Jr.
William Wade, Jr.

Subscribed and sworn to before me this 22nd day of March, 1988.

/s/ Deborah A. Carter
NOTARY PUBLIC in and for the State of Washington, residing at Westport.

My commission expires: 9-17-91

AFFIDAVIT

APPENDIX H

Excerpts from Petition for Review to Washington Supreme Court, filed October 6, 1986:

From p. 2, entitled "Issues Presented For Review":

> Must notice of the issues raised in a motion for summary judgment be given to the opposing party. May an appellate court sustain an order granting summary judgment on an issue where there was lack of notice to the opposing party regarding that issue, and no argument was made to the trial court regarding that issue?

From p. 6:

> It is [the LaMons'] position that the issue of "negligence" was never raised by the motion of defendants for summary judgment and therefore no effort was made by petitioners to address this issue in response to the motion for summary judgment.
>
> A party in answering a motion for summary judgment has a right to be reasonably informed as to the basis for the motion and a right to rely on those specific issues raised in the motion. Anything else would be unfair and would certainly not allow an intelligent response to the motion or an intelligent ruling by the trial court.

From p. 7:

> If the foregoing is not the guideline demanded by the law for the consideration of summary judgments, you convert this procedure to a full blown paper trial on the merits. Regardless of the issues specifically raised in the motion, the opposing party would have to present in paper form their entire case. Such a conclusion would inevitably require a judge to weigh the evidence and deprive a litigant of his constitutional right of trial by jury.

From pp. 11-12:

> It should be clear from the record in this case that plaintiffs never had notice that the issue of Betty Butler's negligence in making the defamatory publication was before the court and this prevented the plaintiffs from having a meaningful opportunity to address this issue.
>
> The court held in *Williams v. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986), that it was error to enter summary judgment for a defendant on an issue not raised by the defendant in its motion and not directly addressed by plaintiffs. That court further held that at a minimum the district court should have provided plaintiffs notice to consider the issue and a meaningful opportunity to address the issue.
>
> The record in this case makes it clear that not only was there no notice regarding the issue of negligence, but the court never even indicated to the plaintiffs that he was considering this issue, and did not give the plaintiffs a meaningful opportunity to address the issue. This was not consistent with the requirements of fairness and due process. U.S. Const., Amend [XIV].

APPENDIX I

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

EDWARD LAMON and LORRAINE LAMON, husband and wife, Plaintiffs, vs. BETTY BUTLER and THE DAILY WORLD, a corporation, Defendants.	NO. 81-2-748-8 AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
GRAYS HARBOR COUNTY) SS.

ROBERT L. CHARETTE being first duly sworn upon oath, deposes and says:

1. That this action was commenced by Edward LaMon and Lorraine LaMon, husband and wife, against the defendants, Betty Butler and The Daily World, a corporation, alleging that an article or articles were published stating that Lorraine LaMon was convicted of assault in the municipal court of Westport, Washington. The complaint further goes on to allege that the latest reference to the conviction appeared in the publication of The Daily World on September 25, 1979. The complaint further alleges that the case against Lorraine LaMon was dismissed by the Superior Court on appeal.

2. That the defendants have answered the complaint of plaintiffs, alleging that Edward LaMon and Lorraine LaMon are public figures within the laws of the

State of Washington and further alleging that the article that appeared in The Daily World or any other article that appeared in The Daily World was true; that the conduct of the defendants as alleged in the complaint is privileged; and that the action was not commenced within the time allowed to bring an action under the laws of the State of Washington.

3. That attached hereto and made a part hereof by reference is a copy of the article that appeared in The Daily World on September 25, 1979.

4. That attached hereto and made a part hereof by reference are copies of certified copies of the cause City of Westport v. Edward G. LaMon and Lorraine LaMon, husband and wife being Grays Harbor County Cause No. 62480. That said copies show that Lorraine LaMon was convicted of assault in the municipal court of the Town of Westport, Grays Harbor County, State of Washington. That said certified copy also shows that the matter was appealed to the Grays Harbor County Superior Court and that on November 10, 1972, an order was entered signed by the Honorable John W. Schumacher, Superior Court Judge which provided: "It is ordered that the above action be dismissed with prejudice. It is further ordered, adjudged, and decreed that the defendants pay all costs of this matter."

5. The dismissal of the action had the effect of allowing the conviction in municipal court to stand.

6. That attached hereto and made a part hereof is an advertisement that Edward and Lorraine LaMon ran in The Daily World on February 27, 1981 setting forth a judgment that had been entered against the defendants,

John Regan and Jane Doe Regan. That said LaMons caused this judgment to be set forth as an advertisement in The Daily World. That your affiant believes that this advertisement was run in more than one newspaper in Grays Harbor County.

7. That The Daily World article dated September 25, 1979, written by Betty Butler, a World staff writer, was in fact a report of a public town council meeting of the Town of Westport.

8. That this court should make and enter an order dismissing the complaint of the LaMons with prejudice.

/s/ Robert L. Charette
Robert L. Charette

SUBSCRIBED AND SWORN to before me on October 11, 1983.

/s/ NOTARY PUBLIC FOR
WASHINGTON
Residing at

APPENDIX J

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

EDWARD LAMON and LORRAINE LAMON, husband and wife, Plaintiffs, vs. BETTY BUTLER and THE DAILY WORLD, a corporation, Defendants.	NO. 81-2-748-8 MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

RCW 4.16.100 states:

> 4.16.100 *Actions limited to two years.* Within two years:
>
> (1) An action for libel, slander, assault, assault and battery, or false imprisonment.
>
> (2) An action upon a statute for a forfeiture or penalty to the state.

The policy of the State of Washington concerning report of public proceedings as set forth in RCW 9.58.050:

> 9.58.050 *Report of proceedings privileged.* No prosecution for libel shall be maintained against a reporter, editor, proprietor, or publisher of a newspaper for the publication therein of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report. The editor or proprietor of a book, newspaper or serial shall be proceeded against in the county where such book, newspaper or serial is published.

The law is well stated in Prosser, *Law of Torts*,3d Ed. (1964) at page 816:

> 5. *Reports of Public Proceedings*. Since it obviously is to the interest of the public that information be made available as to what takes place in public affairs, a qualified privilege is recognized under which a newspaper or anyone else may make such a report to the public, if he were present, might see and hear for himself, so that the reporter is merely a substitute for the public eye – this, together with the obvious public interest in having public affairs made known to all. The privilege of reporting extends to all legislative proceedings, including the investigations of the committees and the deliberations of *municipal councils, and to the acts of executive or administrative officials of the national, state or municipal governments, including their official reports and communications.* There are cases in a few jurisdictions which have extended it further, to include meetings open to the public, at which matters of public concern were discussed. [Emphasis supplied; Footnotes omitted]

We call the court's attention to the fact that the article that is sued on by the LaMons was the report of a public town council meeting of the Town of Westport, which was one in a series of many public meetings that were held as a result of the lawsuit by Edward LaMon and Lorraine LaMon against John Regan who was and is the town Marshall (chief of police) of the Town of Westport.

We also call the court's attention to the fact that there are 10, if not more, superior court files in which Edward G. LaMon and his wife Lorraine LaMon have sued various individuals, mostly those connected with the city government in the city of Westport.

In the case of *O'Brien v. Tribune Publishing Co.*, 7 Wn.App. 107, 499 p.2d 24 (1972), *petition for review denied*,

81 Wn.2d 1007 (1972) *cert. denied* 411 U.S. 906 (1973), an action had been brought by a former administrative assistant of a congressman against a newspaper and others. The alleged libel was based in part on the newspaper's reporting the pleadings which had been filed in a legal action against the plaintiff alleging that he engaged in certain misconduct. In holding that the newspaper had a qualified privilege to report on judicial proceedings, the Court of Appeals stated at page 117:

> A newspaper has a qualified or conditional privilege to report legal proceedings provided the publication is a *fair and accurate statement of the contents and is made without malice.*

And at page 118:

> Since the subject matter contained in the publication of the two lawsuits was one of legitimate public concern the defendants were entitled to refer to the lawsuits in the editorial and advertisement *unless they were motivated by actual malice.*" There was no substantial evidence that defendants knew the statements in the lawsuit were false or that the defendants, on the basis of their knowledge, evidenced a reckless disregard of whether the subject of the lawsuits was false or not . . .
>
> We find that although the statements made about the lawsuits were defamatory, the newspaper was accorded a conditional privilege to report the legal proceedings. As O'Brien recognized, the ad was factual to the degree that it accurately related the nature of the lawsuits as described in the news article. Turner and Chase investigated the lawsuits and interviewed the two plaintiffs in the lawsuits against O'Brien. Franich investigated the filing of the lawsuits. There was not substantial evidence of "actual malice" with reference to the statements about the lawsuits. The fact that the trial of the cases ultimately

> vindicated O'Brien is not material to the determination of the motivations of the defendants before the decision of the trial judge. [Emphasis supplied]

By way of supplying further authority to the court on the specific issue of the privilege of newspaper reporters, we call the court's attention to *Miller v. Argus Publishing Co.*, 79 Wn.2d 816, 490 P.2d 101 (1971). The court in that case held, in part, that a person seeking to recover damages for libel by the news media based upon a statement relating to the defamed person's involvement in an *event of public or general concern* must show by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not. The "public figure" test, which depending upon the plaintiff's prior anonymity or notoriety is no longer a determining factor in such actions. At page 825, the court says:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense, the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.

It is interesting to note that the article that is being sued on in this case alluded to a conviction of Lorraine LaMon in the municipal court in Westport where she was charged with assaulting an intern newspaper reporter for the defendant The Daily World. In citing the *O'Brien* case, we call the court's attention to the fact that Edward LaMon and Lorraine LaMon have chosen to make themselves "public figures" even though that designation

appears to be no longer necessary in order for the newspaper to claim the privilege.

SUMMARY JUDGMENT RULE

In *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981) the court said, commencing at page 484:

> The function of summary procedures in defamation actions has been described a follows:
>
> > Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement. . . .
> >
> > In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered." Smith v. People of State of California, 361 U.S. 147, 154, 80 S.Ct. 215, 219, 4 L.Ed.2d 205 (1959).
>
> (Some citations omitted.) *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011, 17 L.Ed 2d 548, 87 S.Ct. 708 (1967). *See generally* Note, *The Role of Summary Judgment in Political Libel Cases*, 52 S. Cal L. Rev. 1783 (1979). Similarly, in affirming a summary judgment of dismissal in a defamation case, our Court of Appeals has explained:

> Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms.

(Citations omitted.) *Tait v. KING Broadcasting Co.*, 1 Wn.App. 250, 255, 460 P.2d 307 (1969).

In a defamation case brought by a public official, this court explained the test for granting a defendant's motion for summary judgment as follows:

> As to summary judgment procedure in run-of-the mill lawsuits, it is well established that the function of the trial court in ruling upon a motion for summary judgment is not to resolve the basic factual issues, with the ultimate finality which is expected and is appropriate at the final or "full-blown" trial stage of a lawsuit. Rather, the trial court's function is to determine whether a genuine issue as to any material fact exist. . . . In defamation actions by public officials, although the summary judgment procedure is basically the same, we are convinced the decisions of the United States Supreme Court have added a new facet, . . . which must now be considered and resolved by the trial courts. In other words, in such defamation action, if the trial judge at the summary judgment stage determines that the plaintiff has offered evidence of a *sufficient quantum to establish a prima facie case*, and the offered evidence *can be equated with the standard or test of "convincing clarity"* prescribed by the United States Supreme Court decisions, the motion for summary judgment should be denied.

(Citations and footnote omitted.) *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 43, 515 P.2d 154 (1973).

The Court of Appeals has succinctly restated this rule in a recent case:

> [T]he function of the trial court in ruling on a defense motion for summary judgment in a defamation action is to determine if the plaintiff's proffered evidence is of a sufficient quantum to establish a prima facie case with convincing clarity. Unless the plaintiff as done so, the motion must be granted. *Chase v. Daily Record, Inc.*, 83 Wn.2d 37, 515 P.2d 154 (1973); *Exner v. American Medical Ass'n*, 12 Wn.App. 215, 224, 529 P.2d 863, 75 A.L.R. 3d 603 (1974).

Sims v. KIRO, Inc., 20 Wn.App. 229, 237, 580 P.2d 642 (1978).

> Under our cases, a defamation plaintiff must show four essential elements: *falsity, an unprivileged communication, fault, and damages. Sims*, at 233; Restatement (Second) of Torts § 558 (1977). To make out a prima facie case for purposes of avoiding a summary judgment in favor of respondents, Mark would have to allege as to each element facts which would raise a genuine issue of fact for the jury. [Emphasis added]

We submit to the court that we have shown that the article that appeared in The Daily World was true, under operation of a privilege, or a fair comment and report of a public proceeding, i.e., Westport City Council public meeting.

We further submit that the action of the plaintiff should be dismissed with prejudice.

Dated October 11, 1983.

Respectfully Submitted,

CHARETTE BROWN EDWARDS
LEWIS & JANHUNEN
Attorneys for Defendants

by /s/ Robert L. Charette
Robert L. Charette

APPENDIX K

SUPREME COURT OF THE STATE OF WASHINGTON

EDWARD LAMON and LORRAINE LAMON, husband and wife, Appellants,, vs. BETTY BUTLER and THE DAILY WORLD, a corporation, Respondents.	NO. 53196-0 STATEMENT OF ADDITIONAL AUTHORITIES

Appellants submit the following Statement of Additional Authorities, to wit:

1) Regard distinction between issue of fact and issue of law:

Ward vs. Zeugner, 64 Wn.2d 570, 392 P.2d 811 (1964). *Leach vs. Weiss*, 2 Wn.App. 437, 467 P.2d 894 (1970).

2) Regard right to a jury trial:

Jensen vs. Shaw Showcase Co., 76 Wash. 419, 136 Pac. 698 (1913).

3) Regard burden of proof in defamation cases:

Caruso vs. Local 690, 100 Wn.2d 343, 670 P.2d 240 (1983).

DATED: February 18, 1987.

JACK L. BURTCH
Attorney for Appellants

APPENDIX L

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF GRAYS HARBOR

EDWARD LaMON and LORRAINE LaMON, husband and wife,	)	NO. 81-2-748-8
Plaintiffs,	)	AFFIDAVIT
vs.	)	
BETTY BUTLER, and THE DAILY WORLD, a corporation,	)	
Defendants.	)	

STATE OF WASHINGTON)
) SS
GRAYS HARBOR COUNTY)

LORRAINE LaMON, being first duly sworn on oath, deposes and says: That she and her husband are the plaintiffs in the above-entitled action; that this action was brought because of the continuous publications by The Daily World of the false statement that Lorraine LaMon had been convicted of assault in the Westport Municipal Court, and that said assault had been upheld upon appeal in both the Superior Court and Federal Court; that in fact the assault conviction in the Westport Municipal Court of 1972 was appealed, to the Grays Harbor County Superior Court, and on November 10, 1972, at the request of the City Attorney, William E. Morgan, the criminal action of the City of Westport vs. Lorraine LaMon was dismissed with prejudice. That a copy of that Order is attached hereto and incorporated herein by this reference. That a copy of the letter of Mr. Morgan regarding dismissing the

action is also attached hereto and incorporated here by this reference. That about the time the Order of November 10, 1972, was entered, The Daily World reporter who was writing the articles published in The Daily World, indicated in her deposition, that she had the Order read to her. Said reporter then knew from November of 1972 until the present date that the action had been dismissed with prejudice. Despite this knowledge she continued to publish allegations that I had been convicted of assault in the Westport Municipal Court. That these allegations were not even a comment on some of the Westport Council Meetings that she was attending, but were inserted in there independently of anything said in any of those council meetings. That the newspaper articles of which I am referring to, are exhibits in the deposition of Betty Butler, and I incorporate them herein by this reference. That on September 25, 1979, The Daily World again published a news release reporting certain events which had occurred at the Westport City Council meeting of September 24, 1979. That one of the issues at that council meeting was whether or not the City would put up a supersedeas bond for Chief Regan of that City, in a Federal case involving myself and my husband as plaintiffs and John J. Regan and his wife as defendants. No mention was made during that council meeting regarding my having been convicted of the crime of assault in the Westport Municipal Court, but despite this the reporter again referred to my alleged assault conviction in the Westport Municipal Court, but did not refer to the fact that that conviction had been voided by the Judgment and Order of Dismissal entered in the Superior Court on appeal. In the deposition by The Daily World newspaper

reporter, she also indicated that she had read the Findings of Fact and Judgment entered by the Federal Court in our civil rights' action against John Regan and his wife, at the time that those court documents were published by us in the Aberdeen Daily World on October 23, 1978. Despite this, in the September 25, 1979 news release, she again indicated that this lawsuit stemmed from a 1972 incident that resulted in the Municipal Court assault conviction of myself. The Findings of Fact and Judgment in the Federal action speak for themselves, and show clearly that it had nothing to do with the assault conviction but was based upon the Chief of Police of the City of Westport denying us equal protection of the law. Again on April 17, 1980, in a news release by The Daily World reporter Betty Butler, which was published in The Daily World on that date, they again referred to my conviction of assault in the Westport Municipal Court, without pointing out that that conviction in fact had been voided upon appeal to the Grays Harbor County Superior Court. A copy of that news release is attached hereto and incorporated herein by this reference. I am also attaching a copy of the council meetings of the city of Westport of September 24, 1979. I have always been a law abiding citizen, and the only time I was ever arrested was when I was charged in the Westport Municipal Court with assault. I have always attempted to comply with the law and be a law abiding citizen, and because I was not guilty of assault, I appealed the Westport Municipal Court conviction, and as a result of that appeal, the Grays Harbor County Superior Court dismissed the action against me with prejudice. The Order clearly speaks for itself, and does not speak to a dismissal of my appeal, but to a

dismissal of the action with prejudice. Despite the knowledge of The Daily World through its reporter, that the so-called conviction of assault in the Westport Municipal Court had been voided and set aside for naught, she has continuously published the allegation that I was convicted of assault in the Westport Municipal Court. The publication of this information was not only false, but it had nothing to do with the text of the news releases that I object to. That I believe that my original arrest which led to the conviction of assault in the Westport Municipal Court, later dismissed by the Superior Court on appeal, was a direct result of the animosity of Chief Regan towards me and my husband, because the problem that occurred in my restaurant leading to my arrest, under ordinary circumstances would have led to the arrest of the complaining witness John Peterson, who was then a reporter with The Daily World. That since the publication of these articles alleging that I had been convicted of assault in the Westport Municipal Court, both my husband and I have noticed a significant change in the attitude of the other citizens of Westport towards us. That prior to the publications, we had a good reputation in the community for being law abiding citizens, we got along with the citizens of Westport, we operated a business and enjoyed the people of Westport who were our customers, and we had many casual friends within the community. Since these publications were put in the paper we no longer have casual friends within the community, and the prejudicial attitude of other members of the community towards us is very apparent in the way in which we are shunned by the citizens of Westport. That these allegations that I was convicted of a crime like assault had been

extremely humiliating to me and caused great mental anguish and suffering. That as a result of the humiliation, mental anguish and suffering, I have had substantial stress which has created severe health problems for me and I am now being treated for arrhythmia which is an irregular heartbeat. I have not been able to sleep at nights because of my humiliation caused by these publications, I feel estranged from my own community where I have resided for many years, and I have suffered acute embarrassment because of the allegations that I have been convicted of a crime. Neither my husband nor I have ever taken part in city government or been interested in any of the public affairs of the city. We have always attempted to be private people, and the only reason that we have gone to court is to protect our rights.

/s/ Lorraine LaMon
LORRAINE LaMON

SUBSCRIBED and SWORN to before me this 21st day of October, 1983.

/s/ Illegible
NOTARY PUBLIC in and for the State of Washington, residing at

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APPENDIX M

EXCERPTS FROM DEPOSITION OF BETTY BUTLER

Pages 11 - 14.

Q. (by Mr. Burtch, Attorney for Mr. and Mrs. LaMon) Did you subsequently find out that Mrs. LaMon had appealed that conviction?

A. (by Betty Butler) Yes.

Q. How did you find that out?

A. If I recollect correctly, she posted bond or an appeal immediately after the trial.

Q. So you knew –

A. I am not positive of that, but that is my recollection.

Q. So you knew that she was appealing that conviction?

A. Yes.

Q. Now, did you ever look at the Superior Court trial regarding that appeal?

A. No, I didn't look at it. I called the Clerk up and asked about it.

Q. Do you remember which clerk you talked to?

A. No, I don't.

Q. You yourself never looked at the file, is that correct?

A. That is correct.

Q. Did you ever look at the Westport Municipal Court file?

A. I really don't remember.

Q. Did you become aware that the prosecution in the Superior Court level was dismissed against Mrs. LaMon?

A. Yes, I did.

Q. O.K. How did you become aware of that?

A. Because I asked Bill Morgan about it and because I called the county clerk and asked for the reason – under what conditions it was dismissed, and found that it had been dismissed by consent of the two attorneys.

* * *

[Discussion between attorneys omitted]

Q. What did you understand happened in the Superior Court level?

A. My understanding was that the attorneys had decided it was not worth going ahead with and had dismissed. I didn't – perhaps I was wrong. I don't believe so. But I understood that this was not the type of dismissal that negated the judgment.

Q. Where did you arrive at that understanding? How did you arrive at that understanding?

A. From the way in which it was worded.

Q. Did you yourself read the order?

A. No, the Clerk read it to me and I discussed it with Bill Morgan, the city attorney.

Q. Did you ever discuss it with Mr. and Mrs. LaMon's attorney?

A. No.

Q. You say you discussed it with the clerk. Did the clerk do anything other than read the order to you?

A. I really can't remember.

Q. What did Mr. Morgan tell you?

A. He told me pretty much what I just said.

Q. That it did not negate the conviction, he told you that?

A. He said it was by agreement of the two attorneys and really had very little to do with the verdict per se.

APPENDIX N

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

EDWARD LaMON and LORRAINE LaMON, husband and wife, Plaintiffs, vs. BETTY BUTLER and THE DAILY WORLD, a corporation, Defendants.	NO. 81-2-00748-8 ANSWER TO COMPLAINT

COME NOW the defendants and answering the complaint of plaintiffs, admit, deny, and allege as follows:

1. Answering paragraphs I and II of plaintiffs' complaint, these defendants admit the same.

2. These defendants admit that certain articles have appeared in *The Daily World*, a daily newspaper published and circulated within Grays Harbor County, and that some of said articles have been written by Betty Butler, as a World staff writer concerning the plaintiffs. These defendants deny each and every other matter and thing contained in paragraphs III, IV and V of plaintiffs' complaint.

FOR AN AFFIRMATIVE DEFENSE, the defendants allege as follows:

1. That plaintiffs Edward LaMon and Lorraine LaMon, husband and wife, are public figures within the laws of the State of Washington.

2. That any article that has appeared in *The Daily World* was true.

3. That any conduct of the defendants as alleged in the complaint is privileged.

4. That this action has not been commenced within the time allowed to bring an action under the laws and statutes of the State of Washington.

WHEREFORE, having fully answered the complaint of plaintiffs, these defendants pray that said complaint be dismissed with prejudice and without costs to any of the parties, and that the defendants be awarded their costs and disbursements herein, and for such other and further relief as to the court may seem proper in the premises.

DATED: November 4, 1981.

CHARETTE SCHUMACHER BROWN
EDWARDS & LEWIS
Attorneys for Defendants

by /s/
ROBERT L. CHARETTE

APPENDIX O

The Daily World, Aberdeen, Washington, Monday, October 23, 1978. A-5

ATTENTION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EDWARD LAMON and LORRAINE LAMON husband and wife, Plaintiffs,	No. C74-98T
vs.	FINDINGS OF FACT
LOUIS PETERSON AND JANE DOE PETERSON, husband and wife; and JOHN REGAN AND JANE DOE REGAN, husband and wife, Defendants.	

This matter having come on for trial before the above-entitled court on August 31, 1978 and continuing through September 1, 1978, the Plaintiffs appearing personally and with their attorney, Jack L. Burtch, the Defendants, John Regan and Mabel Regan, appearing personally and with their attorney, Stanley J. Krause, and the Defendants, Louis Peterson, having been dismissed from the case on motion of plaintiffs, and the court having heard testimony and having considered the evidence, including exhibits filed herein, and deeming itself fully advised, makes the following:

FINDINGS OF FACT

I. Plaintiffs, at all material times herein, were and now are husband and wife, resided in Westport, Washington have been taxpayers and citizens of Westport, Washington, and have operated a restaurant business known as The Ocean Queen Drive-In, within the corporate limits of said town, now City of Westport, owning said business and the land on which said business is located.

II. That the Defendants, John Regan and Mabel Regan, at all times material to this action, have been husband and wife and have resided in Westport, Washington. That Westport, at all times since May 8, 1968, has been a municipal corporation of the State of Washington, and the said John Regan has been Town Marshal or Chief of Police in charge of the police department for said municipal corporation. That John Regan's employment with Westport as such Chief of Police or town Marshal was on behalf of and of benefit to his marital community.

III. That from 1969 to March 1, 1976, when new owners took possession of The Ocean Queen Drive-In, the defendant, John Regan, as Town Marshal or Chief of Police of Westport, Washington, willfully refused to give proper police protection to the Plaintiffs and their business property and did not give the same police protection to the Plaintiffs that he saw as Chief of Police was provided to other citizens of Westport.

IV. That the said John Regan, as Chief of Police of Westport, Washington, by direct order and by his actions and encouragement, willfully and intentionally caused the Plaintiffs to be deprived of the same police protection as other citizens of Westport, and particularly caused the Plaintiffs' business to be deprived of adequate and equal security checks to protect the business against vandalism and theft.

V. That the said John Regan, as Chief of Police of Westport intentionally and deliberately misused his position and office to discriminate against the Plaintiffs in regard to police protection.

VI. That a direct result of said discrimination Plaintiffs became extremely worried about their business investment, suffered headaches, nervous exhaustion, and lack of sleep, and were humiliated and embarrassed. That they further found it necessary to stay long hours at their place of business after closing time to protect their business investment from vandalism and theft, all of which was detrimental to their physical and mental health. That the strain on Plaintiffs became so unbearable that they were forced to sell their business, including the improvements and land, in February of 1976.

VII. That in addition to attorney fees incurred in preparation of the trial of this action, the Plaintiffs also incurred attorney fees and costs to appeal the dismissal of this action to the Court of Appeals, Ninth Circuit. From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

I. Jurisdiction is vested in this court by virtue of the Civil Rights Act of 1871, 17 Stat. 13, as codified in Title 42, Chapter 21, Section 1983, and the court has jurisdiction over the subject matter of this action and over the parties.

II. That the conduct of said Defendant, John Regan, was willfull and wanton and deprived Plaintiffs of the rights to equal protection of the law under the United States Constitution. That the Defendant was acting under color of state law.

III. The Plaintiffs are entitled to judgment against John Regan, and his martial community composed of John Regan and Mabel Regan, his wife, in the amount of $15,000.00 for compensatory damages,

and the sum of $10,000.00 for punitive damages, for a total judgment of $25,000.00 and $2,500.00 as attorneys fees, together with their costs disbursed herein.

Dated this 13th day of October, 1978.

/s/ Jack E. Tanner
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EDWARD LAMON and LORRAINE LAMON husband and wife,	)
Plaintiffs,	)
vs.	)
LOUIS PETERSON AND JANE DOE PETERSON, husband and wife; and JOHN REGAN AND JANE DOE REGAN, husband and wife,	)
Defendants.	)

This matter having duly come before the court for hearing and the court having heretofore entered its Findings of Fact and Conclusions of Law; Now, Therefore, it is Hereby

ORDERED, that the Plaintiffs be and are hereby given judgement against John Regan and against the marital community composed of John Regan and Mabel Regan, his wife, in the amount of $15,000.00 for compensatory

damages, and the sum of $10,000.00 for punitive damages, for a total judgment of $25,000.00 and $2,500.00 as attorneys fees, together with their costs disbursed herein.

DATED this 13th day of October, 1978.

/s/ Jack E. Tanner
United States District Judge

(PAID ADV. BY EDWARD LaMON, LORRAINE LaMON)
Original and former owners of the Ocean Queens Drive-In, Westport

APPENDIX P

Aberdeen Daily World Article, dated October 20, 1978 (Butler deposition Exhibit 7).

The Daily World, Aberdeen, Washington, Fr.

Westport police chief loses civil rights case

Westport – Edward and Lorraine LaMon, former owners of the Ocean Queen Drive-In restaurant in Westport, have been awarded a $25,000 judgment against Westport Police Chief John Regan and his wife, Mabel, following trial in U.S. District Court in Tacoma.

District Court Judge Jack Tanner ruled that Regan, as police chief, "wilfully and intentionally caused the plaintiffs (LaMons) to be deprived of the same police protection as other citizens of Westport."

He awarded the LaMons compensatory damages of $15,000 and punitive damages of $10,000 plus $2,500 in attorney's fees.

REGAN's attorney, Stanley Krause of Aberdeen, advised the Westport City Council by letter Wednesday that he and Regan wish to appeal the verdict, feeling that "an injustice has been done which I hope can be rectified." The appeal would be heard in the Ninth Circuit Court of Appeals in San Francisco.

However, Regan said, the decision whether or not to appeal "is up to the city council."

The LaMons charged Regan with depriving them of their civil rights to equal police protection, in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

Judge Tanner's findings of fact stated that Regan "caused the plaintiff's business to be deprived of adequate and equal security checks to protect the business against vandalism and theft." The statement did not describe the evidence which led the judge to his decision.

The case grew out of a 1972 Westport Municipal Court conviction of Mrs. LaMon on an assault charge. The conviction was appealed by the LaMons but was upheld in higher courts.

THE NINTH Circuit Court of Appeals in San Francisco, however, held that the LaMons "should be allowed the opportunity to prove their claim" that they had been deprived of their civil rights. That portion of the charges was remanded to U.S. District Court in Tacoma.

According to Krause's summation of evidence, the trial in Tacoma Aug. 31 and Sept. 1 included testimony from Regan and present long-time Westport Police Department employees that the department never discriminated against the LaMons or their business, and testimony (some by deposition) from the LaMons, Celia Arbogast, Jesse Mack, Larry Clevenger and Ed Peek, all former Westport Police Department employees, that the LaMon business was not checked as often as some other businesses.

The evidence presented included several volumes of police journals detailing daily activities from May 1968, when Regan became Westport marshal, until a few months before the LaMons sold their drive-in restaurant in 1976.

POLICE LOGS showed that Westport police responded to five calls from the LaMons in 1968, 1970, 1971, 1972 and 1973; four in 1969, nine in 1974, and seven in 1975. The complaints ranged from prowlers, customers using foul language, reckless driving and minor vandalism to assault charges which later were dropped by the LaMons. Several of the cases resulted in arrests and trials in Westport Municipal Court. No major theft or burglary ever occurred.

The records also showed, according to Krause's summary, that patrolmen visually checked the Ocean Queen almost as often as they checked the Westport bank and the liquor store and more often than they did many other businesses. The drive-in is located on state Highway 105 in Westport's main business section, two blocks from the police station.

So far in the lengthy suit, the City of Westport has paid about $4,000 in attorney's fees to defend Regan. LaMon has protested often by letter to the council that the legal bills are Regan's responsibility, not the city's.

Allegedly, the city was not protected by insurance when the LaMons filed the suit against Regan.

FILED
JUN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1924

In The

Supreme Court of the United States

October Term, 1988

EDWARD LaMON and LORRAINE LaMON,

Petitioners,

v.

BETTY BUTLER and THE DAILY WORLD, a Corporation,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State of Washington

RESPONDENTS' BRIEF IN OPPOSITION

CURTIS M. JANHUNEN
Of –
BROWN EDWARDS LEWIS & JANHUNEN
101 East Market, Suite 501
Aberdeen, Washington 98520
(206) 533-1600

Attorneys for Respondents

June 26, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7pp

QUESTIONS PRESENTED

I.

Did the Petitioners present a prima facie case of negligence sufficient to defeat a Motion for Summary Judgment?

II.

Did the Motion for Summary Judgment provide Petitioners with notice that they were required to present a prima facie case on each of the four essential elements of defamation in order to defeat Respondents' Motion for Summary Judgment?

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Wilson vs. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) 2

RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose the Petition for Writ of Certiorari. Certiorari should be denied for the reason that the decision of the Supreme Court of the State of Washington is not in conflict with other reported appellate decisions and the issues decided by that Court are not significant enough to warrant such review.

OPINIONS

The opinions of the lower courts are found in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF FACTS

The facts of this case appear in both the Court of Appeals decision (Petitioners' App. at 57-67) and the Supreme Court opinions (Petitioners' App. at 1-56). The Petition contains factual assertions not found in the evidence considered by either the trial court or the two state appellate courts which heard the appeals. It is important to note that the attempt to supplement the record before the Washington Supreme Court by filing an affidavit from William Morgan, Westport City Attorney, was rejected. (Petitioners' App. at 34-35).

REASONS FOR DENYING THE PETITION

The Petitioners have framed the questions presented by their Petition in such a fashion as to fit within the

considerations governing review by certiorari. However, the questions are not presented by the decisions of the Washington Supreme Court.

The Washington Supreme Court pointed out in its opinion that under Washington law a defamation plaintiff must show four essential elements: falsity, an unprivileged communication, fault, and damages. The court repeated the requirement that to survive the defendants' Motion for Summary Judgment, the plaintiffs had to present a prima facie case on each element, including fault. (Petitioners' App. at 7, 8).

The court reviewed the evidence presented by Petitioners and concluded that they had not met their burden of making out such a prima facie case of falsity. Under Washington law, as the court pointed out, the moving party is entitled to summary judgment when reasonable persons giving all reasonable inferences to the nonmoving party, can only conclude that the moving party is entitled to judgment. (Petitioners' App. at 34-35). In deciding this issue under Washington law, the appellate court engages in the same inquiry as the trial court. *Wilson vs. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Washington Supreme Court, the Court of Appeals, and the trial judge all engaged in the same inquiry and concluded that a reasonable trier of fact in this case could reach but one conclusion from the evidence: the defendants did not act negligently. Summary judgment was properly entered against them.

The Petitioners argue, however, that even if on this record summary judgment was proper, it should nev-

ertheless not have been entered because they had insufficient notice that the summary judgment hearing would include the issue of fault. As the Washington Supreme Court stated, the Petitioners' received notice through the Respondents' Memorandum that they were required to make out a prima facie case on the four essential elements of defamation under Washington law. They did not do so. The affidavit of Betty Butler went uncontroverted. It clearly established the absence of any negligence on her part.

Finally, under Washington law the trial judge's decision must be sustained if supported by any theory established by the pleadings and supported by the proof. (Petitioners' App. at 37).

CONCLUSION

The decision of the Washington Supreme Court is not in conflict with any other appellate decision. It is firmly based upon prior opinions of that court interpreting Washington law and procedure. There are no special or important reasons to justify the grant of the Petition. It should be denied.

Respectfully submitted,

CURTIS M. JANHUNEN
Of –
BROWN EDWARDS LEWIS & JANHUNEN
101 East Market, Suite 501
Aberdeen, Washington 98520

Attorneys for Respondents

June 26, 1989